(20)

No. 00-949-CSX Title: George W. Bush and Richard Cheney, Petitioners
v.
Albert Gore, Jr., et al.

Docketed: December 9, 2000 Court: Supreme Court of Florida

Entry	Date	Proceedings and Orders
	Dec 8 2000	Application (00A504) for a stay pending the filing and disposition of a petition for a writ of certiorari, submitted to Justice Kennedy.
	Dec 9 2000	Response to application (00A504) filed by respondent Albert Gore, Jr.
	Dec 9 2000	(00A504)Supplemental memorandum in support of application received.
	Dec 9 2000	Petition for writ of certiorari filed. (Response due January 7, 2001)
	Dec 9 2000	Application (00A504) referred to the Court by Justice Kennedy.
	Dec 9 2000	Petition GRANTED. The application for stay presented to Justice Kennedy and by him referred to the Court is granted, and it is ordered that the mandate of the Florida Supreme Court, case No. SC00-2431, is hereby stayed pending further order of the Court. In addition, the application for stay is treated as a petition for a writ of certiorari, and the petition for a writ of certiorari is granted. The briefs of the parties, not to exceed 50 pages, are to be filed with the Clerk and served upon opposing counsel on or before 4 p.m., Sunday, December 10, 2000. Rule 29.2 is suspended in this case. Briefs may be filed in compliance with Rule 33.2 to be replaced as soon as possible with briefs prepared in compliance with Rule 33.1. The case is set for oral argument on Monday, December 11, 2000, at 11 a.m., and a total of 1 1/2 hours is allotted for oral argument. Concurring opinion by Scalia, J.. Dissenting opinion by Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ..
		**********
	Dec 9 2000	Blanket consent to the filing of amicus briefs in support of either party received from counsel for respondents Al Gore, Jr., et al.
	Dec 9 2000	Motion of respondent Katherine Harris, et al. for divided argument filed.
	Dec 9 2000	Blanket consent to the filing of amicus briefs in support of either party received from counsel for Katherine Harris, et al.
	Dec 9 2000	(00A504)Application for stay GRANTED. Application treated as a petition for a writ of certiorari, see 00-949.
	Dec 10 2000	Blanket consent to the filing of amicus briefs in support of either party received from counsel for George W. Bush, et al.
	Dec 10 2000	Motion of respondent Katherine Harris, et al. for

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Entry	Date	Proceedings and Orders
		divided argument GRANTED.
	Dec 10 2000	Brief of petitioners George W. Bush, et al., and separate appendix to petitioners brief filed.
	Dec 10 2000	Brief of respondent Albert Gore, Jr. filed.
	Dec 10 2000	Brief of respondents Carr, Harrell, Richardson, Schuler, Temple, and Thomas filed.
	Dec 10 2000	Brief of respondent John E. Thrasher filed.
	Dec 10 2000	Brief amici curiae of Florida House of Representatives and Florida Senate filed.
	Dec 10 2000	Brief amicus curiae of Michael F. Wasserman filed.
	Dec 10 2000	Brief amici curiae of William H. Haynes, et al. filed.
	Dec 10 2000	Brief amicus curiae of Alabama filed.
	Dec 10 2000	Brief amicus curiae of Mary Ann Smania filed.
	Dec 10 2000	Brief amicus curiae of National Bar Association filed.
	Dec 10 2000	Brief amici curiae of Robert Harris, Steven Medina, and other Florida Voters filed.
	Dec 10 2000	Brief amicus curiae of Brennan Center for Justice at NYU School of Law filed.
	Dec 10 2000	Brief amicus curiae of Robet A. Butterworth, Attorney General of Florida filed.
	Dec 10 2000	Brief of respondents Stephen Cruce, et al. filed.
	Dec 10 2000	Brief of respondents Katherine Harris, et al. filed.
	Dec 11 2000	ARGUED.
	Dec 12 2000	Adjudged to be REVERSED and REMANDED PER CURIAM. Judgment is reversed and remanded for further proceedings not inconsistent with this opinion. Concurring opinion by the CHIEF JUSTICE, joined by SCALIA, and THOMAS, JJ. Dissenting opinion by STEVENS, J., joined by GINSBURG and BREYER, JJ. Dissenting opinion by SOUTER, J., joined by BREYER, J., and by STEVENS and GINSBURG,JJ., in all but Part C. Dissenting opinion by GINSBURG, J., joined by STEVENS, J., and joined by SOUTER and BREYER, JJ., as to Part I. Dissenting opinion by BREYER, J., joined by STEVENS and GINSBURG, JJ., except as to Part I-A-1 with whom SOUTER, J., joins as to Part I. The mandate is issued forthwith pursuant to Rule 45.2.
	Dec 12 2000	MANDATE ISSUED.
	Dec 12 2000	The Clerk directed to issue the mandate forthwith.
	Dec 13 2000	Record returned to Supreme Court of Florida

Charles Rothfeld /Andy Pincus 00-949

No. A- 00A504

(1)

Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
Applicants,

v.

ALBERT GORE, JR., *et al.*,
Respondents.

OFFICE OF THE CLERK
SUPREME COURT, U.S.

EMERGENCY APPLICATION FOR A STAY OF ENFORCEMENT OF THE JUDGMENT BELOW PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court erred in establishing new standards for resolving presidential election contests that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

2. Whether the Florida Supreme Court erred in establishing post-election judicially created standards that threaten to overturn the certified results of the election for President in the State of Florida and that fail to comply with the requirements of 3 U.S.C. § 5, which gives conclusive effect to state court determinations only if those determinations are made "pursuant to" "laws enacted prior to" election day.

3. Whether the use of arbitrary, standardless and selective manual recounts to determine the results of a presidential election, including post-election judicially created selective and capricious recount procedures, that vary both across counties and within counties in the State of Florida violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Governor George W. Bush, as Nominee of the Republican Party of the United States for President of the United States; as Richard Cheney, Nominee of the Republican Party of the United States for Vice President of the United States; Albert Gore, Jr., as Nominee of the Democratic Party of the United States for President of the United States; Joseph I. Lieberman, as Nominee of the Democratic Party of the United States for Vice President of the United States; Katherine Harris, as Secretary of State, State of Florida; Katherine Harris, Bob Crawford, and Laurence C. Roberts, individually and as members of the Florida Elections Canvassing Commission; the Miami-Dade County Canvassing Board; Lawrence D. King, Myriam Lehr and David C. Leahy as members of the Miami-Dade Canvassing Board; David Leahy individually and as Supervisor of Elections; the Nassau County Canvassing Board; Robert E. Williams, Shirley N. King and David Howard (or, in the alternative Marianne P. Marshall), as members of the Nassau County Canvassing Board; Shirley N. King individually and as Supervisor of Elections; the Palm Beach County Canvassing Board; Theresa LePore, Charles E. Burton and Carol Roberts, as members of the Palm Beach Canvassing Board; Theresa LePore individually and as Supervisor of Elections; and Stephen Cruce, Teresa Cruce, Terry Kelly, Jeanette K. Seymour, Matt Butler, John E. Thrasher, Glenda Carr, Lonnette Harrell, Terry Richardson, Gary H. Shuler, Keith Temple, and Mark A. Thomas, as Intervenors.

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IN THE

Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
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v.

ALBERT GORE, JR., *ET AL.*,
Respondents.

EMERGENCY APPLICATION FOR A STAY OF ENFORCEMENT OF THE JUDGMENT BELOW PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Pursuant to Rules 22 and 23 of the Rules of this Court and 28 U.S.C. §§ 1651(a) and 2101(f), Applicants George W. Bush and Richard Cheney respectfully request a stay of enforcement of the judgment below pending the filing and disposition of a petition for a writ of certiorari to the Supreme Court of Florida in this case. The decision below attempts to apply to the November 7, 2000 presidential election retroactive judicial changes in Florida law governing the appointment of presidential electors. The decision below violates Article II of the United States Constitution, conflicts with 3 U.S.C. § 5, and violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. A stay pending this Court's review of these substantial federal questions is essential to prevent Applicants from suffering irreparable injury as a direct result of the

erroneous decision below. A stay is also consistent with this Court's unanimous decision on December 4, 2000, vacating the judgment of the Florida Supreme Court and remanding the case for further proceedings consistent with this Court's opinion. *See Bush v. Palm Beach County Canvassing Board*, No. 00-836, Slip op. (U.S. Dec. 4, 2000) (attached hereto as Exh. D). The Florida Supreme Court has not yet acted on that decision, nor has it shown that its actions are consistent with that decision. Applicants intend to file a petition for a writ of certiorari within twenty-four hours.[1]

I. INTRODUCTION

More than one month after Election Day, events in the State of Florida have thrown the results of the November 7 presidential election into intense turmoil and controversy. The period between November 7 and today has, unfortunately, been characterized by chaotic and standardless manual recounts requested by Democratic presidential candidate Vice President Gore in four heavily Democratic counties and by an outburst of litigation flowing from that process. This Court has already granted certiorari and decided one case involving the Florida election dispute. *See Bush*, Exh. D.

This Court's review is also essential in this case in order to protect the integrity of the electoral process for President and Vice President of the United States and in order to correct the serious constitutional errors made by the Florida Supreme Court. A stay is

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[1] In the alternative, the Court may wish to treat this application as a petition for a writ of certiorari. *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1011, 423 U.S. 1027 (1975); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 400 U.S. 939 (1970), 401 U.S. 402, 406 (1971).

necessary in order to prevent irreparable harm to Applicants, to the electoral process, and to the Nation as a consequence of the flawed decision below.

II. OPINIONS BELOW

The opinion of the Supreme Court of Florida in the contest proceeding (Exh. A) is not yet reported. The order of the Circuit Court for the County of Leon, Florida in that proceeding (Exh. B (Final Judgment) and Exh. C (transcript of ruling from bench)) is not reported. The November 21, 2000, opinion of the Supreme Court of Florida is reported at __ So.2d __, 2000 WL 1725434 (Fla. Nov. 21, 2000) ("*Harris*"). The December 4, 2000, per curiam decision of this Court in 00-836 (Exh. D), vacating the decision of the Supreme Court of Florida in *Harris* and remanding for further proceedings not inconsistent with this Court's decision, is reported at __ S. Ct. __, 2000 WL 1769093.

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article II, Section 1, Clause 2 of the Constitution of the United States provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or

Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

Title 3, Section 5 of the United States Code provides: "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Pursuant to this Court's Rule 14.1(f), the provisions of Florida law involved in this case, including Fla. Stat. §§ 102.111, 102.112, 102.141(4), 102.166, 102.168, and 106.23, and Article V of the Florida Constitution, as well as all other pertinent provisions of the Constitution of the United States, the United States Code, and the Florida Statutes are reproduced at Exh. E hereto.

IV. STATEMENT

A. Facts

The voters of Florida cast their ballots for President on November 7, 2000. Those ballots were counted on November 7, and—pursuant to an existing statutory provision—recounted on November 8. In each case, Governor Bush received the most votes for President. Following those two counts, Vice President Gore filed election protests (*see* Fla. Stat. § 102.166) and requested that four heavily Democratic counties—Broward, Miami-Dade, Palm Beach, and Volusia—out of Florida's sixty-seven counties, manually recount the ballots cast. As this Court is aware, those manual recounts were conducted in different manners from county to county according to amorphous and newly developed "standards" that changed during the recounts. *See Siegel v. LePore*, No. 00-15981, 2000 WL 1781946, at *22 (11th Cir. Dec. 6, 2000) (Birch, J., dissenting).

The laws enacted by the Florida Legislature before the November 7 election set procedures governing the manner in which presidential electors would be appointed. Among these laws were two sections that require local county canvassing boards to certify their election returns to the Department of State no later than 5:00 p.m. on the seventh day following the election. *See* Fla. Stat. §§ 102.111 and 102.112.[2] Section 102.112 indicates that returns filed after that deadline may be ignored by the Secretary of State. That seven-day deadline expired on November 14, 2000, and the Secretary of

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[2] The Florida election code and all other relevant statutes and constitutional provisions are reproduced at Exh. E hereto.

State, after considering proffered justifications for failing to comply with the deadline, announced that she would exercise her discretion and refuse to tabulate late-submitted returns.

Florida law provides that, prior to the seven-day certification deadline, disputes over election results may be raised by submitting a "protest" to the county canvassing boards, *see* Fla. Stat. § 102.166(1)-(2), and/or a request for a manual recount, *see* Fla. Stat. § 102.166(4)-(10). The county canvassing boards have the discretion to reject or accept the request for a recount. Fla. Stat. § 102.166(4)(c) ("The county canvassing board *may* authorize a manual recount.") (emphasis added). If the canvassing board decides to perform a manual recount, it must first conduct a sample manual recount. Fla. Stat. § 102.166(4)(d). If the sample manual recount indicates "an error in the vote tabulation which could affect the outcome," the county canvassing board may conduct a full manual recount, correct the error and recount remaining precincts with the vote tabulation system or request verification of the tabulation software. Fla. Stat. § 102.166(5).

Florida statutes, as of November 7, provided no specific guidance about how to determine whether a particular ballot reflected a vote or not. *See* Fla. Stat.

§ 101.5614(5).[3] As of November 7, 2000, no provision in Florida law exempted the manual recount process from the seven-day certification deadline.

After certification, candidates and voters may "contest" the certification of an election by filing a complaint in Leon County Circuit Court. *See* Fla. Stat. §§ 102.168, 102.1685. Such contests must be initiated within 10 days of the certification, *see* Fla. Stat. § 102.168(2), and involve extensive judicial proceedings, including formal pleadings, discovery, and trial. *See* Fla. Stat. § 102.168(3)-(8).

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[3] As a result, there were wide discrepancies across and within the counties both with regard to determinations about undertaking, or completing, manual recounts and as to how to assess ballots. For example, the standards for evaluating ballots were changed repeatedly during the recounts. Indeed, after tabulating as proper votes only punch card ballots that had been perforated by voters, certain county officials yielded—two weeks after the election—to demands by Democratic Party officials for the adoption of yet another new standard which would permit local officials to validate ballots with mere "discernible indentations" ("dimpled chads"). In Palm Beach County, a court ordered the canvassing board to consider "dimpled" chads even though the board's pre-existing 1990 policy precluded treating mere indentations as valid votes. *See Florida Democratic Party v. Palm Beach County Canvassing Bd.*, No. CL 00-11078 AB, 2000 WL 1728721 (Fla. Cir. Ct. Nov. 22, 2000). On November 20, the Florida Democratic Party asked the Florida Supreme Court to fashion even more expansive new standards *de novo* for the recounting of the ballots in the counties it had singled out for special treatment. Vice President Gore repeated that request to the Florida Supreme Court on November 30, when he urged that court to exercise mandamus jurisdiction to begin counting ballots. Petition for Writ of Mandamus or Other Writ or, In the Alternative Review of Trial Court Ruling and for Enforcement of Injunction, *Gore v. Harris*, at 21-30 (filed Nov. 30, 2000). In that brief, Vice President Gore argued that "as a matter of law, a discernible indentation on the ballot constitutes objective evidence of the voter's intent." *Id.* at 35. The Florida Supreme Court rejected that request, and in this case refused once again to attempt to clarify the standard(s) for determining whether to count "dimpled" ballots, "hanging chad," etc., instead simply leaving these issues to the unfettered discretion of unidentified individuals who will apparently be charged with making those determinations on an ad hoc and completely standardless basis.

B. Prior Proceedings

On November 13, 2000, Vice President Gore and others brought suit in the Circuit Court for Leon County seeking an order directing the Secretary to waive the November 14 deadline established by the Florida legislature for certifying the results of the election. Instead, the Gore campaign sought a judicial amendment to the statute that would allow late results from three counties—Broward, Miami-Dade, and Palm Beach—to be included in the final vote tally. The circuit court denied that relief on November 17, holding that the Secretary of State had "exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision." *McDermott v. Harris*, Case No. 00-2700 (Fla. Cir. Ct. Nov. 17, 2000) (order denying emergency motion to compel compliance with and for enforcement of injunction).

That same day, the Florida Supreme Court, exercising its "equitable powers" under the Florida Constitution, *sua sponte* enjoined the Secretary of State from certifying the November 7 presidential election results for the State of Florida until further order from the Court. Four days later, on November 21, the Florida Supreme Court issued an opinion reversing the state trial court, holding that the trial court "erred in holding that the Secretary [of State] acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts." *Harris*, 2000 WL 172543 at *14. The Florida Supreme Court reached this conclusion by announcing a new rule of law to constrain the Secretary's discretion under Fla. Stat. §§ 102.111 and 102.112, declaring for the first time that "the Secretary may reject a Board's amended returns only

if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process." *Harris*, 2000 WL 1725434 at *14.

Based on this newly fashioned judicial amendment, the Florida Supreme Court directed the Secretary of State to accept untimely manual recount returns through 5:00 p.m. on November 26, 2000. *Id.* at *15. The court also maintained its injunction preventing the Secretary from certifying any election results before that date, and directed the Secretary to include in her certified election results all manual recount returns received by that date. *Id.*

Manual recounts thus continued in Broward, Palm Beach, and Miami-Dade counties. Results from the manual recounts were submitted to the Secretary of State by Broward County on November 25. On November 22, the Miami-Dade County Canvassing Board unanimously decided to halt its manual recount, after counting 136 of the 635 precincts in the county. The Palm Beach Canvassing Board began a manual recount, but it did not provide the complete results of its manual recount to the Secretary of State by the 5:00 p.m. November 26 deadline set out by the Florida Supreme Court.

As of 5:00 p.m. on November 26, the tabulated results showed once again that Governor Bush had received more votes for President than any other candidate. Accordingly, the Secretary of State certified Governor Bush as having received the most votes for President in Florida, and the Florida Elections Canvassing Commission announced that Governor Bush was the winner of Florida's twenty-five electoral votes for President. In certifying the election returns on November 26, the Secretary of State

made clear her opinion that the final vote totals were due by November 14 (with the exception of overseas military absentee ballots), the deadline specified by Florida statute. Nonetheless, because the Florida Supreme Court had extended that deadline until 5:00 p.m. on November 26, the certified total announced by the Secretary of State included the results of the manual recount in Broward County completed after November 14, but before 5:00 p.m. on November 26.

C. This Court's Earlier Decision

On November 24, 2000, this Court granted a writ of certiorari to review the November 21 decision of the Florida Supreme Court extending the deadline for submitting vote totals. This Court issued a unanimous per curiam opinion on Monday, December 4, 2000, vacating the Florida Supreme Court's decision and remanding the case to the Florida court "for further proceedings not inconsistent with this [Court's] opinion." *Bush*, Exh. D at 6. This Court determined that there was "considerable uncertainty as to the precise grounds for the [Florida Supreme Court's] decision" and thus found reason "to decline at this time to review the federal questions" raised by petitioner. *Id.* This Court, however, cautioned the Florida Supreme Court against overriding the Florida Legislature's "wish" to secure for Floridians the benefits of the "safe harbor" in 3 U.S.C. § 5. *See id.* In vacating the decision and remanding the case to the Florida Supreme Court, this Court specifically sought clarification "as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2" and "as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5." *Id.* at 7.

D. Proceedings Below

On November 27, 2000, the day after the Secretary of State certified the results of the November 7 election and the Florida Elections Canvassing Board declared Governor Bush the winner of Florida's twenty-five electoral votes, Vice President Gore and Senator Lieberman (the "Gore Respondents") filed a complaint in the Circuit Court for Leon County pursuant to Fla. Stat. § 102.168 to contest the certification of Governor Bush as the winner. Although the complaint contended that Governor Bush did not receive "more votes in the Presidential election in the State of Florida than Al Gore," it—like the earlier protest actions—sought relief only with respect to heavily Democratic counties. The complaint alleged that the results certified by the Secretary of State: (1) improperly failed to include a manual recount of ballots in Miami-Dade County that the Miami-Dade Canvassing Board unanimously decided not to complete; (2) improperly failed to include results of a manual recount in Palm Beach County that were not submitted by the November 26, 5:00 p.m. deadline set out by the Florida Supreme Court; and (3) improperly included the results from Nassau County's November 7 machine count of ballots, rather than Nassau County's incomplete November 8 machine recount of ballots. The complaint also asked the court to evaluate 3,300 ballots from Palm Beach County and some 9,000 ballots from Miami-Dade County that the Gore Respondents contend were not properly counted.

Governor Bush and Secretary Cheney filed an answer and raised several affirmative defenses to the contest, including constitutional challenges. *See* Exh. F (Answer And Affirmative Defense Of Defendants George W. Bush And Richard Cheney

To Complaint To Contest Election); *see also* Exh. N (Motion And Memorandum In Support Of Defendants George W. Bush And Dick Cheney's Motion To Dismiss For Lack Of Subject-Matter Jurisdiction, Failure To Name Indispensable Parties, And Failure To State A Claim). The affirmative defenses included, among others, that: the relief requested by the Gore Respondents is barred because it would violate Article II, § 1 of the U.S. Constitution; the Gore Respondents' request to recount votes in only two selected counties differently than in Florida's remaining sixty-five counties would violate the Equal Protection and Due Process Clauses of the U.S. Constitution; the post-election judicial limitations imposed by the Florida courts on the discretion of state executive officials to certify election results and the standards applied to resolve any controversies violate the Due Process Clause of the Fourteenth Amendment and fail to comply with the requirements of 3 U.S.C. § 5; the Broward, Miami-Dade and Palm Beach County Canvassing Boards altered standards for evaluating votes after the November 7 election, in violation of the Due Process Clause and 3 U.S.C. § 5; and including the results of the partial manual recount in Miami-Dade County would violate the Voting Rights Act of 1965, 42 U.S.C. § 1973.[4]

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[4] As part of that contest action, Governor Bush and Secretary Cheney also filed a third-party complaint against Broward and Volusia counties contending that in the event the court granted the Gore Respondents' request for a recount in Miami-Dade and Palm Beach counties, then it must also conduct a recount in Broward and Volusia counties under the same standards. Exh. G (3P ¶ 7) at 3. That third-party complaint also alleged that the shifting standards for considering ballots by the Broward County Board violated the Due Process Clause and 3 U.S.C. § 5. Exh. G (3P ¶¶ 15-40) at 4-11. The court below rejected Applicants' arguments in this regard without comment.

On December 4, 2000, after hearing two full days of evidence, the Leon County Circuit Court rejected the contest and denied relief to the Gore Respondents. The Circuit Court made several factual findings in support of its holding, including findings that there was no credible evidence establishing a reasonable probability that the Florida election results would be different if the requested relief were granted to the Gore Respondents: that the Miami-Dade County Canvassing Board did not abuse its broad discretion in its decision not to perform a complete manual recount; and that the Palm Beach County Canvassing Board did not abuse its discretion in considering the 3,300 ballots the Gore Respondents sought to have reviewed by the Circuit Court.

The Circuit Court also made a factual finding that the Palm Beach County "process and standards [for evaluating ballots] were changed from the prior 1990 standards." Exh. C at lines 0011-7 to 0011-8. The Circuit Court went on to state that these changes were "perhaps contrary to Title III, Section (5) of the United States Code." *Id.* at lines 0011-8 to 0011-9. The Circuit Court also expressed its concern that implementing a different standard for evaluating the 3,300 disputed Palm Beach County ballots would create a two-tier system not only within that county, but also with respect to other counties. That two-tier system, explained the Circuit Court, citing and relying on an opinion letter from Florida's Attorney General, "would have the effect of treating voters differently depending upon what county they voted in. . . . [thereby raising] legal jeopardy under both the United States and state constitutions." *Id.* at lines 0011-21 to 0011-22 (quoting November 14, 2000 letter of Florida Attorney General).

On December 8, 2000, the Florida Supreme Court, by a margin of 4-3, reversed the circuit court, ordering the following: (1) the inclusion of 176 or 215 net votes for the Gore Respondents as "identified" by the Palm Beach Canvassing Board, but submitted to the Secretary of State after the Florida Supreme Court's November 26 deadline. Exh. A at 4; (2) the inclusion of 168 net votes for the Gore Respondents "identified in a partial recount" by the Miami-Dade Canvassing Board, but never submitted to the Secretary of State, *id.*; (3) the trial court to "examine the approximately 9000 additional Miami-Dade ballots placed in evidence, which have never been examined manually." *Id.* at 5. The majority also ordered the Supervisor of Elections and Canvassing Boards "*in all counties* that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith." *Id.* at 38-39 (emphasis added).

Remarkably, the majority opinion did not respond to the questions posed by this Court's December 4 opinion vacating the Florida Supreme Court's decision in *Harris*. Indeed, although the majority recognized that the "need for prompt resolution and finality is especially critical in presidential elections where there is an outside deadline established by federal law," *id.* at 36, it nonetheless embarked upon a recount plan that it knew could not be fulfilled and that would, by definition, conflict with 3 U.S.C. § 5. *See* Exh. A at 38 n.21 ("we agree that practical difficulties may well end up controlling the outcome of the election"); *id.* at 67 (Harding, J., dissenting) (majority "provid[ed] a remedy which is impossible to achieve and which will ultimately lead to chaos").

Chief Justice Wells wrote a strong dissent in which he concluded that the majority's order to conduct a partial recount "*appears to me to be in conflict with the United States Supreme Court decision [in Harris].*" Exh. A at 55. He also warned that Florida's "[c]ontinuation of [a] system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress." *Id.* at 51. Chief Justice Wells also concluded that the order directing the trial court to conduct a manual recount of ballots violates Article II of the United States Constitution, because "neither th[e Florida Supreme Court] nor the circuit court has the authority to create the standards by which it will count the under-voted ballots." *Id.* a 53.

Finally, the majority held that in tabulating the ballots, the standard to be applied in determining whether a vote is "legal" is whether there is a "clear indication of the intent of the voter." Exh. A at 39 (citing Fla. Stat. § 101.5614(5)). However, as the dissents point out, that standard is a departure from the standard in effect on November 7. Justice Harding, joined by Justice Shaw, concluded that "the majority has established standards for manual recounts—a step that this Court refused to take in an earlier case." *Id.* at 67 (Harding, J., dissenting). Similarly, Chief Justice Wells concluded that the majority's decision "not only changes a rule after November 7, 2000, but it also changes a rule this Court made on November 26, 2000." *Id.* at 53 (Wells, C.J., dissenting).

On December 8, 2000, Applicants filed with the Florida Supreme Court a petition to stay its ruling pending the filing of a petition for a writ of certiorari. Although the

Florida Supreme Court has yet to rule on that petition, this case certainly presents "extraordinary circumstances" that warrant relief from this Court. *See* Sup. Ct. R. 23.3.

V. JURISDICTION

This Court has jurisdiction to review by writ of certiorari any "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States." 28 U.S.C. § 1257(a).

Applicants seek review of the Supreme Court of Florida's decision, which, as demonstrated below, violates Article II of the United States Constitution, 3 U.S.C. § 5, and the Fourteenth Amendment to the Constitution. Applicants properly raised these federal claims in the court below. *See* Exh. H (Amended Brief Of Appellees George W. Bush And Dick Cheney) at 45-46; *see also* Exh. M (Clarification Of Argument For Appellees George W. Bush And Dick Cheney) at 2-8. Accordingly, the questions to be presented in the petition plainly fall within the jurisdiction of this Court under 28 U.S.C. § 1257(a).

The judgment below is plainly final for purposes of this Court's certiorari jurisdiction. As this Court has long recognized, "[t]here have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing." *Republic Natural Gas Co. v. Oklahoma*,

334 U.S. 62, 68 (1948). As discussed below, absent an immediate stay from this Court, Applicants face irreparable harm from the judgment below.

Moreover, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court identified four categories of cases in which a judgment is sufficiently final to justify this Court's review even though further proceedings remain to be held in the state courts. The fourth such category permits review even in "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court," and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Id.* at 482-83. In these circumstances, "if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at 483; *see also Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 612 (1989); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988); *Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964).

The fourth *Cox Broadcasting* category is plainly applicable here. The federal questions presented by this case have been finally decided by the court below, which squarely rejected Applicants' arguments that the Article II and 3 U.S.C. § 5 preclude the

relief ordered by the court below, and that the selective and standardless manual recounts approved and mandated by the court below would violate the federal Constitution and other federal laws. Exh. H (Florida Supreme Court Brief) at 45-46. Accordingly, a federal issue has been conclusively resolved, and there is no need for further state court proceedings to finalize or crystallize the lower court's disposition of those federal questions. It is equally clear that, absent immediate review, Applicants "might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court." 420 U.S. at 482. The case was remanded for the selective manual recounts to occur, and it is certainly possible that the results of those recounts could eliminate Applicants' need to litigate further, thereby depriving this Court of an opportunity to decide the important constitutional and statutory issues at stake.

Moreover, reversal of the court below on any of the federal questions presented in this case "would be preclusive of any further litigation on the relevant cause of action." 420 U.S. at 482-83. If, as Applicants contend, the court below lacked authority to issue the judgment below and the selective manual recounts ordered below violate the federal Constitution or otherwise are inconsistent with federal law, then the determination of those federal issues would be preclusive of any further state court litigation on the issue of recounts.

Finally, it is readily apparent that "a refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 483. The holding of the Florida Supreme Court that the United States Constitution permits judicially-ordered selective, ever-shifting, and standardless hand-counting, if allowed to remain in effect,

would seriously erode fundamental federal policies, including the right to vote—the most basic right of citizenship bestowed by the Constitution, *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)—and the vital public interest in the lawful and consistent handling and tabulation of ballots and the fairness and finality of elections for federal office, particularly for the President of the United States. Accordingly, *Cox* and related cases warrant immediate review of "the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 482-83; *accord Goodyear Atomic Corp*, 486 U.S. at 178-79 (applying this exception where "the unreviewed decision of the Ohio Supreme Court might seriously erode federal policy in the area of nuclear production").

VI. REASONS FOR GRANTING THE STAY

This application fully satisfies the criteria that govern the propriety of granting a stay, because (1) there is "a reasonable probability that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari," *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers); (2) there is "a fair prospect that five Justices will conclude that the case was erroneously decided below," *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); and (3) it is likely that irreparable injury will result if a stay is denied. *Id.*; *California v. American Stores Co.*, 492 U.S. 1301, 1304-07 (1989) (O'Connor, J., in chambers). In appropriate cases, the Circuit Justice may "balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public." *Lucas*, 486 U.S. at 1304. These factors clearly justify issuance of a stay here.

A. There Is A Reasonable Probability That At Least Four Members Of This Court Would Conclude That This Case Warrants Plenary Consideration

There is a reasonable probability that four or more Members of this Court would vote to grant certiorari.

1. This Court previously granted certiorari to review a closely related case arising out of the same election dispute in Florida. *See Bush*, Exh. D. The petition for a writ of certiorari that will be filed in this case will present similar questions under Article II of the United States Constitution and 3 U.S.C. § 5, as well as the Fourteenth Amendment.

Few issues could be more important than those presented in this case. At stake is the lawful resolution of a national election for the office of President of the United States. As this Court has often recognized, the American public's right to vote is one of the most sacred protected by our Constitution: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). The Florida Supreme Court's decision poses an imminent danger to that right.

The choosing of presidential electors is a matter of great national importance and interest. As this Court stated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), "in the context of a presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the

impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Id.* at 794-95 (footnote omitted). Given the national significance of the Florida election results, it is essential that the counting of ballots be conducted in a fair and consistent manner in accordance with both federal laws and the laws established by the Florida Legislature pursuant to the authority conferred on it under Article II of the United States Constitution. In the wake of the Florida Supreme Court's decisions, counties in Florida have participated in a blatantly arbitrary, subjective, and standardless process in attempting to count ballots by hand in an effort to divine the intent of the voters. The Nation's citizens have witnessed this standardless process unfold as they anxiously await a resolution of the election outcome. By retroactively changing the law in Florida through judicial intervention, the Supreme Court of Florida's decision undermines the statutory scheme Florida has established, pursuant to the grant of authority through Article II of the United States Constitution, and consistent with Section 5, to elect electors for President.

2. This Court's review of the Supreme Court of Florida's decision is warranted because it "decided an important federal question that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c); it "decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals," Sup. Ct. R. 10(b); and it "decided an important question of federal law that has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 10(c). As discussed in greater detail below, this case presents important questions regarding the federal constitutional and statutory restraints on the ability of States to impose *post hoc* requirements on the appointment of

presidential electors, and to change requirements for the resolution of controversies concerning the appointment of electors. The decision below also conflicts with precedents of this Court—including this Court's December 4, 2000 decision in *Bush v. Palm Beach County Canvassing Board*—and of the courts of appeals regarding the scope of the Fourteenth Amendment protections for the fundamental right to vote and the application of 3 U.S.C. § 5. Moreover, these important questions are presented within a few days of December 12, the date on which the State of Florida may make a final determination concerning the appointment of its electors to take advantage of the "safe harbor" under 3 U.S.C. § 5.

3. There is a profound national interest in ensuring the fairness and finality of elections, particularly an election for the highest office in the land. This is precisely the type of question that the Nation justifiably expects this Court authoritatively to decide. Indeed, because of the Florida Supreme Court's judicial amendments to the legislative structure for choosing Florida's electors, absent a decision by this Court, the election results from Florida will remain under a cloud of uncertainty. The consequence could be a constitutional crisis. Quite simply, this is the sort of case that this Court should unquestionably hear.

B. Applicants Are Likely To Prevail On The Merits

There is at least a "fair prospect" that Applicants will prevail on the merits in this case.

1. The Florida Supreme Court's Decision Violates Article II Of The Constitution Of The United States

The Framers expressly granted the legislatures of the several States plenary power over the appointment of electors, providing that each State shall choose electors "in such Manner as the Legislature thereof may direct." U.S. CONST., art. II, § 1, cl. 2. As this Court has recognized, the Constitution "leaves it to the legislature *exclusively* to define the method of effecting the object [of appointing electors]." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (emphasis added). Indeed, the Framers' "insertion of those words" in Article II—"in such Manner as the Legislature . . . may direct"—undeniably "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Bush*, Exh. D at 5 (Dec. 4, 2000) (quoting *McPherson*, 146 U.S. at 25).

As described above, the Florida legislature enacted a carefully-crafted statutory scheme to govern the appointment of presidential electors. In so doing, "the legislature [was] not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush*, Exh. D. at 4. By rewriting that statutory scheme—thus arrogating to itself the power to decide the manner in which Florida's electors are chosen—the Florida Supreme Court substituted its judgment for that of the legislature and violated Article II. Such a usurpation of constitutionally-delegated power defies the Framers' plan. The Florida legislature never provided for such judicial meddling in its legislative structure. Indeed, only by resort to its "equitable powers" to provide extraordinary relief under the Florida Constitution could this one Florida court find authority to act.

The decision below overrides numerous provisions of the detailed and specific statutory scheme enacted by the Florida legislature. In the first place, contrary to the ruling below (Exh. A at 1), the Supreme Court of Florida lacked jurisdiction (as a matter of federal law) to enter the judgment below.[5] As this Court recently reemphasized, Article II, § 1 authorizes the States to appoint electors only in "such Manner as the Legislature thereof may direct," and thus the federal Constitution "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power" of the State. *Bush*, Exh. D at 5 (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)). Under Florida law, assuming *arguendo* that the legislature has authorized contest actions in presidential elections, only the Circuit Court of Leon County possessed legislatively conferred jurisdiction to resolve the Gore respondents' claims. Fla. Stat. § 102.168(1) (permitting election certifications to be "contested in the circuit court"); *id.* § 102.168(8) (authorizing "[t]the circuit judge to whom the contest is presented" to resolve contests).

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[5] Applicants specifically raised this point in their post-argument brief in the court below, noting that Article II confers sole authority on state legislatures to determine the manner of appointing electors (Exh. M at 2), and that the legislature's authority "'cannot be taken from them or modified by their State constitutions . . . .'" Exh. M at 2 n.1 (citations omitted). As Applicants pointed out, "equitable relief cannot lie because . . . 'the original and appellate jurisdiction of the courts of Florida is derived entirely from article V of the Florida Constitution, *not* by the Florida legislature.'" Exh. M. at 5-6 (citation omitted). In pointing out the absence of any legislatively conferred basis for the Supreme Court of Florida's exercise of jurisdiction in this case, Applicants corrected any misimpression that may have been caused by their counsel's response to questions from Chief Justice Wells during oral argument below. The court below apparently relied on the parties' "agree[ment] that this appeal is properly before this Court" (Exh. A at 1 n.1), but of course "'the parties cannot stipulate to jurisdiction over the subject matter where none exists.'" *Polk County v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997) (quoting *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994)).

By contrast, the Florida Legislature granted no such jurisdiction to the Florida Supreme Court. The sole basis for the judgment below was instead the Florida Constitution, which confers original and appellate jurisdiction on the state supreme court in certain circumstances. FLA. CONST. art. V, § 3(b). Because Article II, § 1 of the federal Constitution does not permit state constitutions to override a state legislature's selection of the manner of choosing electors, and because the Florida Legislature has given the Florida Supreme Court no role in reviewing any contest to the results of a presidential election, the court below lacked jurisdiction to enter its judgment, and the judgment below should be vacated.

Second, the judgment below also conflicts with federal law because it ignores the fact that there is no basis or precedent in Florida law for applying the ultimate judgment of a successful § 102.168 contest proceeding to a presidential election. By its terms, the § 102.168 remedy does not apply to presidential elections, and it certainly does not authorize a contest action by a candidate for President (rather than by an unsuccessful candidate for presidential elector). Florida law instead establishes separate procedures for certifying the election of presidential electors and for replacing electors when appropriate, but made no provision for a "contest" of the presidential election. *See* Fla. Stat. §§ 103.011, 103.021(5). Thus, the judgment below violates Article II, § 1, and fails to comply with 3 U.S.C. § 5 because it rests upon a newly announced judicial extension of the § 102.168 remedy that was not authorized by the Florida Legislature. *See Fladell v. The Elections Canvassing Comm'n of the State of Fla.*, Nos. CL00-10965AB et al. (Fla. Cir. Ct. Nov. 20, 2000) (attached as Exhibit I hereto), *aff'd on other grounds*,

Fladell v. Palm Bch. County Canvassing Bd., Nos. SC00-2372 & SC00-2376, at 4 (Fla. Dec. 1, 2000).

Third, the court essentially overruled Fla. Stat. §§ 102.166(4)(d) and 102.166(5)(c), which mandate that a "county canvassing board *shall*," among other options, "[m]anually recount *all* ballots" (emphasis added). By ordering that the results of the *partial* recount conducted by the Miami-Dade Canvassing Board be included in the certified election results, the Florida Supreme Court rejected the judgment of the legislature, which expressly *denied* the canvassing boards the authority to recount or certify only a portion of the ballots.

Fourth, the court violated the mandate of this Court in *Bush v. Palm Beach County Canvassing Board*, No. 00-836 (Dec. 4, 2000), by relying in substantial part on its vacated November 21 decision. For example, in justifying its order that additional votes from Palm Beach County must be added to the certified totals despite the fact that those votes were the product of a manual recount that met neither the statutory seven-day deadline nor the November 26 deadline fashioned out of whole cloth by the court below in its now-vacated opinion, the court below expressly relied on the now vacated judgment as the sole basis for that determination. Exh. A at 34-35 (citing holding of November 21 decision as the basis for extending the November 26 deadline). Moreover, by upholding the inclusion of the additional Broward County votes resulting from the untimely manual recount in that county, the court below necessarily and impermissibly relied on the validity of November 21's extension of the deadline for submission of those vote totals, even though the November 21 decision stands vacated by this court.

Finally, the court's refusal to reject reliance on "dimpled" or indented ballots (such as those counted in Broward County) violates Fla. Stat. § 101.5614(5), which expressly provides that a ballot will be considered valid "if there is a *clear indication* of the intent of the voter as determined by the canvassing board" (emphasis added).[6] By permitting ballots with the slightest of indentations to be counted as valid votes, and by authorizing courts (rather than "*the canvassing board*" vested with statutory authority) to make such determinations, the court below substituted its judgment for that of the legislature.

This Court has recognized that the legislature's Article II power of appointment is exclusive. *See McPherson*, 146 U.S. at 34-35 ("The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states.") (quoting with approval Senate Rep. 1st Sess. 43 Cong. No. 395 (Sen. Morton)). Indeed, the Constitution contains provisions that vest responsibility in the States *qua* States, *e.g.*, U.S. CONST. art. I, § 8, cl. 16, as well as provisions that, as here, single out the particular branch of state government charged with exercising certain duties integral to the functioning of the federal government, *e.g.*, U.S. CONST., art. I, § 2, cl. 4. In light of the Constitution's precise distinctions among state legislative, executive, and judicial powers,

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[6] To the extent that the Florida legislature has empowered the canvassing boards to determine what constitutes a "clear indication" of voter intent, the decision below also substitutes judicially-mandated standards for standards issued pursuant to legislatively-delegated authority. *See* Exh. J (Palm Beach County Guidelines On Ballots With Chads Not Completely Removed (Nov. 2, 1990)) (providing that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote") (entered into evidence as P.E. 46).

the Framers' decision to vest specific authority in state legislatures must be understood to be exclusive of state executive or judicial power to prescribe the "manner" of appointing electors; where the Constitution assigns a particular function to a particular branch of state government, fulfillment of the constitutional design requires that such an assignment be accorded legal meaning. Thus, in the absence of a clear and express delegation of the appointment power by the legislature to a coordinate branch of government, the Constitution bars the exercise of that power by any other branch.

It is no answer to characterize the Florida Supreme Court's decision as an ordinary exercise of judicial review. The Florida Supreme Court does not have original jurisdiction in this matter. The sole jurisdictional basis relied upon by the court below is Article V of the Florida *Constitution*, but the exercise of authority conferred by the state constitution to intrude into the process for selecting presidential electors would violate Article II of the federal Constitution by exercising a power not given to it by the Florida legislature. Mandamus or other equitable relief cannot lie because, as the Florida Supreme Court itself has frequently noted, "the original and appellate jurisdiction of the courts of Florida is derived entirely from Article V of the Florida Constitution, *not* by the Florida legislature." *Allen v. Butterworth*, 756 So. 2d 52, 63 (Fla. 2000). *See also Dresner v. City of Tallahassee*, 134 So.2d 228, 229 (Fla. 1961) ("This Court derives its appellate jurisdiction from article V, Florida Constitution."). *See* Exh. M at 5-6.

Furthermore, by authorizing extended (and partial) manual recounts in selected counties, and by unilaterally altering the statutory deadlines for certifying election returns, the court below plainly altered the "manner" of appointing electors. Although

the Framers recognized that a state legislature could *permit* state courts to play a more active role in the process—it could, if it chose, even grant the state judiciary the authority to determine the manner of appointment, *see McPherson*, 146 U.S. at 34-35—the Florida legislature has done no such thing here. The unauthorized exercise of constitutionally delegated power cannot escape this Court's scrutiny through the simple expedient of labeling it "judicial review" of a contest proceeding.

2. The Florida Supreme Court's Decision Fails To Comply With 3 U.S.C. § 5

Congress has provided that when "controversies or contests concerning the appointment of" presidential electors from a State arise, such disputes are to be resolved "pursuant to" those "laws enacted *prior to*" election day. 3 U.S.C. § 5 (emphasis added). If this "principle of federal law" is complied with, *Bush*, Exh. D at 6, a resulting determination of the controversy is entitled to "conclusive" effect and "shall govern in the counting of the electoral votes," 3 U.S.C. § 5. As the language of the statute makes clear, Congress has asserted its federal role in the context of presidential elections to ensure that States will be "assure[d] finality" in their determinations when they resolve such disputes in compliance with Section 5. *Bush*, Exh. D at 6. Thus, "a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of [state law] that Congress might deem to be a change in the law." *Id.*

Despite this Court's recent suggestion to the Florida Supreme Court that it is not free to disregard the Florida Legislature's decision to avail itself and the citizens of Florida of the benefits of § 5, and despite that court's recognition that "because the

selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, the Florida election law scheme must yield in the event of a conflict" (Exh. A at 18 n.11), the court below has again ordered relief that fails to adhere to § 5's requirements, with the result that the electoral process in Florida has been thrown into complete confusion and chaos only 4 days before the December 12 deadline imposed by § 5. Swift action from this Court is essential to preserve the protections that Congress sought to confer upon the States through § 5, to secure the certainty and finality of Florida's electoral process, and to ensure that Florida's electoral votes are accorded proper consideration in Congress.

The Florida Supreme Court's decision effectively announces several new *post hoc* changes in Florida law. First, prior to the state court's determination in this case, existing Florida law granted discretion to the local county canvassing boards to determine whether to conduct manual recounts and, if so, the methods by which to count ballots. When confronted with cases in which counties declined to conduct manual recounts, courts have deferred to the canvassing board's determination, even when challenged under the contest provision of Fla. Stat. § 102.168. *See, e.g., Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. Dist. Ct. App. 1992) ("Although section 102.168 grants the right of contest, it does not change the discretionary aspect of the review procedures outlined in section 102.166. The statute clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the

canvassing board.").[7] The case law had also remained faithful to the statutory language embodied in Fla. Stat. §§ 102.166(4)(c), (5)(a)-(c), which clearly leaves the determination of whether to conduct a manual recount to the county canvassing boards. By now ordering counties to conduct manual recounts that they determined not to undertake, the Florida Supreme Court has changed preexisting law by departing from the statutory language (and also from the prior case law construing that language) and by effectively announcing a new standard that manual recounts are *required* in cases of claimed voter error.[8]

Similarly, as the law existed before the November 7 election, there was no statewide standard that acceptable ballots included "dimpled" ballots under Florida law. The Election Code provides only that the canvassing board is to look for "a clear indication of the intent of the voter." Fla. Stat. § 101.5614(5). This begs the question, of course, of what constitutes a "clear indication." Whatever may be a proper answer, one

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[7] Indeed, the Fourth District Court of Appeals reversed a trial court's decision that a local canvassing board had erred in refusing to conduct a manual recount. *See Broward County Canvassing Bd.*, 607 So. 2d at 509. In upholding the board's discretion to reject the candidate's request for a manual recount after an initial machine recount changed the margin of victory from five votes to three, the court noted the board's reasoning: "Such voter errors, the board explained, are caused by hesitant piercing, no piercing, or intentional or unintentional multiple piercing of computer ballot cards, creating what are referred to as overvotes and undervotes." *Id.*

[8] That order is also at odds with what appears to have been previous policy that the counties undertook manual recounts only because of evidence of machine error and not solely because of the failure of certain voters to fully punch through their ballot cards. During oral argument before the U.S. Supreme Court in *Bush v. Palm Beach County Canvassing Board*, the Florida Attorney General's office *could not name a single instance, prior to this year's presidential election, in which manual recounts were undertaken for mere voter error.* *See* Tr. of Oral Arg. at 39-40, attached hereto as Exh. K.

answer not permitted is one created after Election Day. Nevertheless, the Florida Supreme Court has now weighed in, and under its decision "dimpled" ballots have effectively been deemed to constitute valid votes (as in the case of Broward County). This standard was previously unknown to Florida law, and constitutes a change in the legislative standard for counting votes that fails to meet Section 5's requirements.[9]

Finally, the 15th Circuit Court's November 15 decision relied upon and followed by the Palm Beach County Canvassing Board to count patterns of "dimpled" or indented chads as votes was a plain deviation from the County's prior, established written policy.[10] According to the Palm Beach County guidelines on counting ballots issued in November 1990, the County Canvassing Board made clear that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote . . . an indentation is not evidence of intent to cast a valid vote." Exh. J. That standard of what constitutes a vote was clearly reflected in the instructions given to Palm Beach voters on election day, which stated: "After voting, check your ballot card to be sure your voting selections are clearly and cleanly punched and there are no chips left hanging on the back of the

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[9] As discussed below, this differential treatment of votes depending upon county of residence is also a violation of the Equal Protection Clause, and the manifestly unfair change in vote counting standards mid-way through the recount violates the Due Process Clause..

[10] *See Florida Democratic Party v. Palm Beach County Canvassing Board*, No. CL00-11078AB slip. Op. (Fla. 15th Jud. Cir. Nov. 15, 2000)

card." *Touchston v. McDermott*, No. 00-15985, 2000 WL 1781942 at *n.19 (11th Cir. Dec. 6, 2000) (Tjoflat, dissenting).[11]

Despite that previously announced standard, and the clear instructions on the voting card, the 15th Circuit Court ordered the Board to reverse course after the November 7 election and decided that it would count some ballots that would not have complied with its prior policy. This change in policy by the organ of government granted the authority to conduct manual recounts fails to satisfy 3 U.S.C. § 5's express requirement that controversies be resolved pursuant to law as it exists prior to election day. By giving effect to that change in policy, the Florida Supreme Court's decision compounds the noncompliance.

In each of these ways, the Florida Supreme Court's decision conflicts with Section 5's requirements. By announcing new, post-election changes in the law, the Florida Supreme Court's decision has two distinct consequences. First, because it failed to rule "pursuant to" the laws as enacted prior to election day, its decision is not "conclusive" and should not bind the parties or Florida's election officials. Second, the decision places Florida's twenty-five electors in peril, in that the resolution of the contest concerning these electors will not be afforded Section 5's protections for Congress's counting purposes because it was resolved based upon a newly announced rule of law. These actions frustrate the Florida legislature's choices in establishing a statutory scheme

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[11] The instructions provided to voters in Broward County, also a punch-card county, similarly stated: "To vote, hold the stylus vertically. Punch the stylus straight down through the ballot card for the candidates or issues of your choice." *Id.*

consistent with 3 U.S.C. § 5 and, therefore, should be reversed by this Court. These actions also frustrate one of the obvious objectives of both Article II and Title 3—confidence in presidential election results by assuring that elections are determined under rules in effect when the votes are cast.

3. The Florida Supreme Court's Decision Violates The Equal Protection And Due Process Clauses Of The Fourteenth Amendment

a. Equal Protection

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote . . . ." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The right to vote is "denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. "The conception of political equality . . . can mean only one thing—one person, one vote . . . . The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." *Id.* at 558 (internal citations omitted). Moreover, as the Fifth Circuit stated in 1980, "qualified voters have not only a constitutional[ly] protected right to vote, but also have the concomitant right to have their votes counted. These rights can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." *Gamza v. Aguirre*, 619 F.2d 449, 452 (5th Cir. 1980) (internal citations omitted).

It is well established that the Equal Protection Clause prohibits government officials from implementing an electoral system that operates to give the votes of similarly situated voters different effect based on the happenstance of the county or

district in which those voters live. *See, e.g., Roman v. Sincock*, 377 U.S. 695, 712 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653 (1964) (state apportionment scheme "cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside").

The requirement of equal treatment of voters in different geographical areas extends to situations—like this one—where a facially neutral voting scheme results in the disparate treatment of voters based on the counties or geographic regions in which they live. In *O'Brien v. Skinner*, 414 U.S. 524 (1974), for example, this Court held unconstitutional the New York absentee ballot statute because it made no provision for persons who were unable to vote while they were incarcerated in their county of residence. Under the New York statute, "if [a] citizen is confined in the county of his legal residence he cannot vote by absentee ballot as can his cellmate whose residence is in the adjoining county." *Id.* at 529. As a result, the Court held, "New York's election statutes . . . discriminate between categories of qualified voters in a way that . . . is wholly arbitrary." *Id.* at 530. The Court therefore concluded that "the New York statutes deny appellants the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* at 531.

As in *O'Brien*, the necessarily disparate manual recount ordered by the Florida Supreme Court arbitrarily treats voters differently based solely on where they happen to reside in Florida. For example, where there is a partial punch or mark for one candidate on a ballot, that ballot may be counted as a "vote" in the counties (and now courts as

well) undertaking a manual recount, but not in any other Florida county. The court's order also entails the result that the ballots that are counted as part of the contest proceedings be evaluated under a different standard than those used to evaluate ballots in the other counties that have already completed manual recounts. Indeed, the "standards" used in those earlier manual recounts themselves constituted equal protection violations, since, to the extent they existed at all, they varied widely from county to county, and even changed from day to day or hour to hour within a single Florida county. By permitting further inconsistent and standardless recounts to be conducted during the contest proceeding, the court's order guarantees disparate treatment for similarly situated ballots both in other counties and within the counties subject to the order. The equal protection violations are compounded by the fact that the court adopted a standard of "selective deference" to the decisions of the county canvassing boards that, as discussed above, only benefits the Gore Respondents. This intentional discrimination among voters on the basis of their county of residence, or even the precinct in which they reside, violates the fundamental principle of equal protection that voters cannot be subjected to disparate treatment "merely because of where they reside[ ]." *Reynolds*, 377 U.S. at 557; *see id.* at 566 ("Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious

discriminations based upon factors such as race or economic status.") (citation omitted).[12]

b. Due Process

Florida's failure to provide and apply clear and consistent guidelines to govern the manual recounts constitutes a violation of the Due Process Clause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). The facts here clearly present "'an officially-sponsored election procedure which, in its basic aspect, [is] flawed,'" *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. 1981) (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077-78 (1st Cir. 1978)), *cert. dismissed*, 459 U.S. 1012 (1982), and which manifestly violates the Due Process Clause.

As explained above, the Florida Supreme Court has deviated substantially from the election law and practices in place prior to election day by ordering that the manual recount occur under circumstances and standards that have never before been established in Florida law. The court has therefore changed the rules yet again as the "game" was being played, and as a result, the contest is being determined by "rules" that were not in place when the votes were cast—in plain violation of the Due Process clause. *See Logan*,

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[12] The recent opinion letter of the Florida Attorney General quoted by Circuit Judge Sauls in his decision endorses the application of that principle to the facts present here. The Attorney General reasoned that "If hand recounts have already occurred in [a] number of . . . counties . . . while similar hand counts are blocked in other counties . . . , a two-tier system for reporting votes results. A two-tier system would have the effect of treating voters differently, depending upon what county they voted in. A voter in a county where a manual count was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted." Exh. L.

455 U.S. at 432; *Roe v. Alabama*, 43 F.3d 574, 580-81 (11th Cir. 1995); *Duncan*, 657 F.2d at 703; *Griffin*, 570 F.2d at 1077-79.

In *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970), for example, the Seventh Circuit invalidated an election board's imposition of *ad hoc* requirements for nominating petitions, agreeing with the plaintiffs' contention that "the Board's failure to issue guidelines clarifying the statutory standards for nominating petitions contravened due process." *Id.* at 1054, 1055. As the Seventh Circuit explained, "protection of the full measure of First and Fourteenth Amendment freedoms commands that state regulation of nominating procedures include a clear statement of the specific requirements by which nominating petitions will be tested." *Id.* at 1058.

The arbitrary, capricious, and standardless manual recount being used here suffers from the same fault as the nomination procedure invalidated in *Briscoe*. If the State of Florida wishes to implement a manual recount procedure, it must ensure that meaningful guidelines are established for determining whether and how to conduct such a recount, rather than leaving such crucial decisions to the unbridled discretion and arbitrary decision making of judges, local election officials, and as-yet unspecified other individuals who may have a keen personal interest in the outcome of an election. The court's failure to provide such guidelines constitutes a clear violation of the Due Process Clause.

With humans making subjective determinations about an absent voter's intent, without standards established by law, there is always the risk that the method for determining how to count a vote will be influenced, consciously or unconsciously, by the

officials' desire for a particular result. That risk is heightened significantly here because of the irreversible damage done to the ballots during the recount processes and the clear errors that have occurred during the manual recounts.[13] Further manual recounts, by another varying and inconsistent set of arbitrary "standards," cannot, by definition, be accurate. They will simply compound the arbitrary and standardless process that has been the hallmark of the Florida recount.

C. Applicants Will Suffer Irreparable Harm In The Absence Of A Stay, And The Balance Of The Equities Clearly Favors Issuance Of A Stay

Applicants will suffer irreparable injury unless a stay issues in this case. The Florida Supreme Court's decision imperils Governor Bush's proper receipt of Florida's twenty-five electoral votes. The Florida Supreme Court's decision raises a reasonable possibility that the November 26 certification of Governor Bush as the winner of Florida's electoral votes will be called into doubt—or purport to be withdrawn—at a time when the December 12 deadline for naming Florida's electors could preclude Applicants' ability to seek meaningful review by this Court.[14]

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[13] For example, during the manual recount process, ballots were poked, prodded, rumpled, creased, twisted, dropped, stained, tabbed, and otherwise mishandled. Not surprisingly, this rough treatment caused massive damage to the ballots, including dislodging and removing "chads" from ballots. State and county elections officials admitted that the more the ballots are handled, the more chads fall out, and, thus, the harder it is to conduct an accurate count. Indeed, the counters themselves recognize that they have made substantial errors in counting the ballots handled in this fashion in the counties selected for manual recounts.

[14] Under 3 U.S.C. § 7, the date for the meeting of electors this year is December 18 and thus controversies and contests must be resolved by December 12 for their

[Footnote continued on next page]

Failure to resolve a controversy or contest concerning the appointment of presidential electors pursuant to the law as enacted prior to election day will jeopardize the "conclusive" effect of any such determination for Congress's counting purposes. *See* 3 U.S.C. § 5; *Bush v. Palm Beach County*, No. 00-836, slip op. at 6. Because Section 5 requires disputes over the appointment of presidential electors to be resolved within six days before the time fixed for the meeting of electors, unless this Court acts immediately the Applicants' injury will be irreparable. Reversal of the Florida Supreme Court's decision to correct the clear constitutional errors, however, will eliminate the possibility that a controversy or contest will be ongoing on December 12, because the Florida electors will have been determined by standards in effect prior to election day. *See id.* ("If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors."). The current "contest" can not resolve the controversy because it is irreparably tainted by the Florida Supreme Court's unauthorized and unlawful rewrite of the legislative structure to select Florida's electors.

Furthermore, failure to stay the enforcement of the Florida Supreme Court's order will also irreparably harm the entire electoral process under our federal/state dual scheme. Because December 12 is rapidly approaching, the state court's ruling threatens

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[Footnote continued from previous page]
determination to be given conclusive effect and to govern in Congress's counting of the electoral votes.

to deprive the State of Florida of its proper voice in the presidential election—the very voice Section 5 intends to protect. Having failed to resolve the controversy at issue consistently with Section 5's requirements, the Florida Supreme Court's decision is deprived of the "conclusive" effect that Congress would otherwise accord to it in similar circumstances. Such an outcome will completely frustrate Congress's purposes in enacting Section 5 of ensuring States that the votes of their rightfully appointed presidential electors will be counted by Congress.

It is no answer to claim that Applicants, as the currently certified winners in Florida, face only "speculative" injury as a result of the Florida Supreme Court's order. In the peculiar, important and sensitive circumstances of this case, any delay in the final resolution of this matter threatens Applicants, and any doubt as to the election undermines the national interest.

V. CONCLUSION

Under these circumstances, the effect of a failure to grant a stay could well be to deny Applicants fully effective relief in this case and to inflict material harm on the electoral process. A stay is further justified by the extraordinary importance of the outcome of this case and the extremely time-sensitive nature of relief. Applicants are threatened with irreparable injury, and the equities clearly favor granting a stay, because a stay is the only means of protecting the integrity of the federal electoral process while ensuring proper and orderly access to the judicial system.

Respectfully submitted.

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December 8, 2000

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IN THE SUPREME COURT OF THE UNITED STATES

(2)

No. 00 A 504

GEORGE W. BUSH AND RICHARD CHENEY,
Applicants,

v.

ALBERT GORE, JR., ET AL.,
Respondents.

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On Emergency Application For A Stay Of Enforcement
Of the Judgment Below Pending the Filing and
Disposition Of A Petition For A Writ Of Certiorari
To The Supreme Court of Florida

OPPOSITION OF RESPONDENT ALBERT GORE, JR. TO EMERGENCY MOTION FOR A STAY PENDING CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

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OPPOSITION OF RESPONDENT ALBERT GORE, JR. TO EMERGENCY APPLICATION FOR A STAY PENDING CERTIORARI

Applicants' request for a stay makes a remarkable claim: for the ostensible purpose of advancing the interests of voters, applicants urgently request this Court to *stop the counting of votes*. Their surprising assertion is that a candidate for public office can be irreparably harmed by the process of discerning and tabulating the will of the voters. This suggestion is contrary to established law, the U.S. Constitution, and basic principles of democracy. The application should be denied because applicants have no cognizable legal interest that will be harmed by that count, because a halt in the vote-count process can serve

only to delay ultimate resolution of the election contest, and because their underlying legal claims lack merit.

Against this background, it is not surprising that applicants have failed to make out *any* of the showings necessary to justify such extraordinary relief. *First*, they offer absolutely no credible claim of irreparable harm from the mere judicial counting of previously uncounted ballots. In fact, the only harm alleged by applicants is their fear that, if the count is halted, they somehow will not be able to benefit from the safe harbor of 3 U.S.C. § 5 should they ultimately prevail in the contest action. But that argument is manifestly wrong. Governor Bush can benefit from the safe harbor only if he ultimately prevails in the contest by December 12; yet staying the vote-count can do literally nothing to advance, and can only impede, the expeditious resolution of the contest. Applicants have thus failed to demonstrate any irreparable injury that they will suffer from the continued counting of ballots, and they therefore cannot meet the threshold requirement for this Court's intervention at this stage of the proceedings.

Granting the stay, by contrast, would cause irreparable harm both to respondents and to the public interest. Halting the count of votes until the case has been disposed of by this Court would make it virtually impossible for the Florida courts to complete the review of ballots by December 12, gravely handicapping Vice President Gore's prospects of benefitting from the safe harbor provided by 3 U.S.C. § 5. As a consequence, Gov. Bush proposes a grossly inequitable asymmetry: granting a stay of the vote count would have no bearing on his ability to benefit from the safe harbor, but would substantially undercut Vice President

Gore's hope of invoking the provision. Denying the stay application, in contrast, would avoid those dangers while imposing no injury on applicants; it would leave the status quo intact, giving this Court an opportunity to address the merits.[1]

Second, the public interest weighs strongly against interfering with a state supreme court's decision interpreting state law, because "[a]s a general rule, this Court defers to a state court's interpretation of state statute." *Bush* v. *Palm Beach County Canvassing Board*, No. 00-836 (Dec. 4, 2000), slip op. 4. It would be extraordinary for this Court to enter preliminary relief suspending the Florida Supreme Court's order based on that court's interpretation of state law, especially where that court carefully explained how its holding followed from Florida statutes and prior Florida decisions. And that is especially so because this Court has not yet determined "the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power,'" or the degree to which 3 U.S.C. § 5 imposes any limit on the state supreme court's authority. *Bush*, slip op. 5-6 (citation omitted).

A stay would also undermine the public interest by imposing enormous burdens and disruption on overworked public officials in Florida. The Florida Supreme Court noted the extraordinary effort made by public servants in the State during the last month (see slip op. 39 n.22), and over the last 18 hours public employees across the State have already made Herculean efforts to complete the expeditious judicial count ordered by the Florida Supreme

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[1]Of course, these considerations suggest that, if the Court believed that review of this case were appropriate, it should greatly expedite its consideration of the matter.

Court. To suddenly stay those efforts, only to restart them if this Court were to deny review or affirm the judgment below, would seriously disserve the public interest.

Third, applicants have no substantial likelihood of success on the merits of the issues presented in the application; the federal claims would not warrant relief in any event. The record in this case makes clear that the Florida Supreme Court took to heart the concerns underlying this Court's decision in *Bush* v. *Palm Beach County Canvassing Board*, *supra*, and carefully avoided reliance on any authority other than statutes enacted by the Florida Legislature. The Court likewise carefully explained how its conclusions flowed from prior cases construing those statutes. And the miscellany of other constitutional issues raised by applicants also lack substance. For all of these reasons, the application for a stay should be denied.

STATEMENT

1. Florida's election law establishes two distinct phases for the resolution of disputes regarding the outcome of an election. The first phase runs from election day through the certification of the results of the election. It involves the reports of county canvassing boards to the Secretary of State and Elections Canvassing Commission, and the resolution by the county canvassing boards of any protests filed pursuant to Fla. Stat. § 102.166. This aspect of Florida's election law was before this Court in *Bush* v. *Palm Beach County Canvassing Board*, *supra*.

The second, post-certification phase for resolution of election disputes is the election contest action created by the Legislature in Fla. Stat. § 102.168. That law provides that "the

certification of election * * * of any person to office * * * may be contested in the circuit court by any unsuccessful candidate for such office * * * or by any elector qualified to vote in the election related to such candidacy." One of the grounds for contesting an election is the "rejection of a number of legal votes sufficient to change or place in doubt the result of election." Section 102.168(3)(c). The Legislature provided courts with broad authority both to investigate claims in contest actions and to fashion relief:

> The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

Section 102.168(8).

2. On November 27, 2000, following the certification of Gov. Bush as the winner of the Presidential election in Florida, respondent Gore commenced this election contest action under Section 102.168 in Leon County Circuit Court. The complaint raised five claims:

- it challenged the rejection of 215 net legal votes for respondent Gore identified by the Palm Beach County Canvassing Board that had been excluded from the certified vote totals;
- it challenged the rejection of 168 net legal votes for Vice President Gore identified by the Miami-Dade County Canvassing Board also excluded from the certified vote totals;

— it challenged the inclusion in the certified totals of the election night returns from Nassau County in place of the machine recount tabulation required to be used to determine the certified totals by Fla. Stat. § 102.141;

— it argued that the court should review approximately 9000 Miami-Dade County ballots that were not counted by the machines, because – among other reasons – review of approximately 2000 similar ballots by the county canvassing board yielded nearly 400 legal votes; and

— it challenged the rejection of 3300 legal votes in Palm Beach County during the county canvassing board's manual recount.

3. Following a two-day trial, the circuit court entered judgment for applicants and the other defendants on all claims. Three of the circuit court's determinations were relevant to its refusal even to examine the 9000 Miami-Dade County ballots that were introduced into evidence during the trial. First, the court held that the ballots should not be reviewed because the Miami-Dade County Canvassing Board did not abuse its discretion in terminating its manual recount pursuant to Section 102.166. Tr. of Ruling, Sauls, J. (Dec. 3, 2000) at 10. Second, the court held that respondent Gore was required to establish a "reasonable probability that the results of the election would have been changed" before the court could review the ballots and that respondent Gore had failed to carry that burden. *Id.* at 9. And third, the court held that in an election contest action, the court may not review only the contested ballots but rather must review all ballots cast or no ballots at all. *Id.* at 12.

4. The Florida Supreme Court affirmed in part and reversed in part. The court affirmed the judgment regarding both the ballots from Nassau County and the rejection of ballots by the Palm Beach County canvassing board. Slip op. 33, 35. The court reversed, however, as to the excluded ballots from Palm Beach and Miami, holding that valid ballots may not be disregarded in an election contest simply because they were not identified prior to the close of the county certification process. Slip op. 35. Most significant for present purposes, the court also held, not only that respondent is "entitled to a manual count of the Miami-Dade County undervote," but also that the Florida Election Code required "a counting of the legal votes contained within the undervotes in all counties where the undervote has not been subjected to a manual tabulation." Slip op. 2.; see *id.* at 28-32, 38-40.

ARGUMENT

THE APPLICATION FOR A STAY PENDING CERTIORARI SHOULD BE DENIED

The factors governing the issuance of a stay are well-settled: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987). See R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE 689-690 (7th ed. 1993). Likelihood of success on the merits in the context of an application to stay the mandate of a lower court turns on whether there is a "reasonable probability" that four Justices will vote to grant certiorari and a "significant possibility" that a majority of the Court will reverse on the

merits. See, *e.g.*, *Curry* v. *Baker*, 479 U.S. 1301, 1302 (1986) (Powell, J., in chambers) (denying application for stay in elections matter).

None of these factors weighs in favor of applicants here. To the contrary, considerations of irreparable injury and the balance of equities weigh overwhelmingly against issuance of the stay.

A. Applicants Will Not Suffer Irreparable Injury In The Absence Of A Stay

Demonstrating irreparable injury is essential to applicants' request for a stay: "An applicant's likelihood of success on the merits need not be considered, * * * if the applicant fails to show irreparable injury from the denial of the stay." *Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers). See R. Stern, E. Gressman, S. Shapiro, & K. Geller, *supra*, at 690. Applicants treat this requirement, however, as a brief and rather embarrassed afterthought to their application. See Stay App. 39-41. As we understand it – and there are parts of applicants' argument that we find confusing – applicants appear to assert that they will suffer irreparable injury unless the count of ballots is stopped immediately because (1) under 3 U.S.C. § 5, a State's disposition of controversies regarding the selection of presidential electors is "conclusive" only if those controversies are resolved prior to December 12; (2) if the vote-count goes forward, the current contest may not be completed by that date; and (3) Governor Bush, if he prevails in the contest action after December 12, will lose the presumption of the § 5 safe harbor. See Stay App. 39-40.

With all respect, this argument is wholly insubstantial. Even if Governor Bush is correct in all of his assertions – and in his further argument that the election contest is

somehow "tainted by the Florida Supreme Court's unauthorized and unlawful rewrite of the legislative structure" (Stay App. 40), a point that we address below – a stay would be *completely* irrelevant to his claimed injury. Governor Bush can achieve his objective of a conclusive resolution to this dispute by December 12 in only one of two ways: (1) the count can go forward and the courts can enter a final judgment by December 12, or (2) this Court can grant review and determine that Governor Bush is entitled to prevail in the contest by that date. A stay of the count obviously does nothing to advance either of those goals, and thus does literally nothing to avoid the irreparable injury of which Governor Bush complains.

In this respect, it is important to focus on the particular action ordered by the Florida Supreme Court and the particular relief sought by applicants. That court ordered the review of specified ballots and the adjustment of the certified vote totals in light of that count – a count the outcome of which will not be known until it is complete. Of course, if that review does shift the vote totals in respondent's favor, the injury to applicants will not be the least bit irreparable: "There will be time enough for [applicants] to present his constitutional claim" to this Court "if and when" the threatened harm comes about at the entry of final judgment in the contest proceeding. *Deaver* v. *United States*, 483 U.S. 1301, 1303 (1987) (Rehnquist, C.J., in chambers).

It may be added that applicants do not, and could not, make any claim that the process of counting ballots causes him injury in any cognizable way. After all, applicants retain their ability to obtain full review of all of their constitutional claims if the count ultimately goes against them. See, *e.g.*, *Roudebush v. Hartke*, 405 U.S. 15, 26 (1971) (in

case involving election for U.S. Senator, reversing injunction against recount that was based on alleged irreparable injury of interfering with Senate's ability to judge elections and returns, explaining that "[i]t would be no more than speculation to assume that the Indiana recount procedure would impair such an independent evaluation by the Senate"); *Perez v. Edwards*, 336 So. 2d 1072 (La. App. 1976) (holding that candidate could not establish irreparable injury from casting and counting of ballots because any injury can be redressed by subsequent holding that underlying authorizing provisions are unconstitutional); *Grand Rapids City Clerk v. Judge of Superior Court*, 115 N.W.2d 112 (Mich. 1962) (refusing to issue injunction against election proceedings that would interfere with completion on fixed schedule and where effective relief would subsequently be available). As a consequence, they simply do not face any cognizable injury at this point.

B. Any Injury Applicants Might Suffer Is Sharply Outweighed By The Irreparable Injury To Respondent Gore From Issuance Of A Stay By This Court

A stay thus is neither necessary nor sufficient to protect applicants against irreparable harm; entry of a stay would have no bearing at all on Gov. Bush's ability to take advantage of the 3 U.S.C. § 5 safe harbor. What a stay would do, of course, is prevent Vice President Gore from *ever* gaining the benefit of the Section 5 presumption. A stay would essentially ensure that if this Court either denies review or affirms the decision below – even prior to the Section 5 deadline – the counting of the ballots would push a "final determination" well beyond that date. That means that Governor Bush could gain the benefit of Section 5 if this Court acted quickly, but that Vice President Gore could not, even if this Court ultimately affirmed the decision below. This result would turn the purpose of a stay application on its

head: rather than "temporarily suspend[ing] judicial alteration of the status quo" to permit the Court to exercise jurisdiction over proper federal claims, see *Turner Broad. Sys.* v. *FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers), the grant of a stay here would gratuitously disadvantage one litigant for no permissible purpose.

If, on the other hand, the counting is allowed to proceed, both parties will have an equal opportunity to obtain protection under Section 5, with the winner depending upon both the outcome of the counting and the outcome of any further proceedings in this Court. Such a decision does not impose any irreparable injury whatsoever on Governor Bush, and it fairly balances the equities among the parties.

C. The Public Interest Weighs Strongly Against A Stay

Finally, the rights of third parties and the public interest both weigh strongly against applicants at this juncture. The judicial review of ballots currently underway, which this application seeks to halt, has been commenced to vindicate the constitutional right to vote of those citizens who cast votes that might not otherwise have been properly tabulated. See, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1963) (citizens have constitutionally protected right to have their votes counted); *United States* v. *Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution is the right of qualified voters within a state to cast their ballots and have them counted."); cf. *United States* v. *Mosley*, 238 U.S. 383, 386 (1915) (it is "equally unquestionable that the right to have one's vote counted is as open to protection * * * as the right to put a ballot in a box"). The public also has a definite interest in the effectuation of all legal procedures in place under

Florida law to determine the rightful winner of Florida's electoral votes in the presidential election.

Moreover, the Florida Supreme Court has determined that Florida law requires judicial tabulation of uncounted ballots. That determination is entitled to considerable deference by this Court. Indeed, it may be disturbed only if this Court finds a basis in federal law for doing so. Yet, as we explain below in more detail, the two grounds identified by this Court in *Bush* are manifestly inapplicable here for two separate reasons. To begin with, this Court in *Bush* took pains to make clear that it was not reaching the federal questions in that case. Surely it would not be appropriate to upset the determination of the Florida Supreme Court by affording interim relief here – with the drastic consequences just discussed for the balance of the equities among the parties – when this Court in *Bush* did not even address the questions presented in that case. Slip op. 6. Second, recognizing the potential concerns articulated by this Court in *Bush*, the Florida Supreme Court exercised great care to ensure that its decision was firmly rooted both in statutes enacted by the Legislature and in longstanding interpretations of those statutes. See pages 13-18, *infra*. That counsels great restraint in interfering with the Florida Supreme Court's interpretation of Florida law.

D. Applicants Cannot Establish A Likelihood Of Success On The Merits

Because applicants can establish neither irreparable injury nor a convincing case on the balance of harms, it is unnecessary at this time for the Court to address the likelihood of success on the merits of applicants' claims. Beyond that, however, the federal claims they raise would not warrant relief in any event.

1. In its opinion in *Bush*, this Court quoted *McPherson* v. *Blacker*, 146 U.S. 1 (1892), but did not address "the extent to which the Florida Constitution could, consistent with Art. II, §1, cl. 2, 'circumscribe the legislative power.'" Slip op. 5. Because the Court was "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, §1, cl. 2," it "decline[d] at this time to review the federal questions asserted to be present." Slip op. 7, 6. Instead, the Court vacated and remanded for clarification of the grounds of the Florida Supreme Court's decision.

The present case is totally different from *Bush*. There is no indication whatsoever in the lower court's opinion that it "saw the Florida Constitution as circumscribing the legislature's authority" under the federal Constitution. Indeed, the Florida Supreme Court clearly recognized the limitations imposed by Article II -- it expressly acknowledged them at the outset of its opinion. Slip op. 5 ("These statutes established by the legislature govern our decision today"). Accordingly, there is no federal question and no basis for reversal.

The only mention of the Florida Constitution in the Florida Supreme Court's opinion occurs in connection with that court's assertion of jurisdiction, noting that the parties had agreed that the Florida court's assertion of jurisdiction did not run afoul of Article II. Slip op. 1 & n.1. Although applicants repudiated their concession twenty-four hours after it was made, the initial concession was a sensible one: it is clear that there is no Article II issue here.

The Florida Legislature re-enacted the contest statute in 1999 against the settled background rule that decisions of circuit courts in contest actions are subject to appellate

review. See, *e.g.*, *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla.1998); *Harden v. Garrett*, 483 So. 2d 409 (Fla. 1985); *Bolden v. Otter*, 452 So.2d 564 (Fla. 1984); *McPherson v. Flynn*, 397 So. 2d 665 (Fla. 1981). "It is an elementary principle of statutory construction that in determining the effect of a later enacted statute, courts are required to assume that the Legislature passed the latter statute with knowledge of the prior existing laws." *Romero* v. *Shadywood Villa Homeowners Ass'n*, 657 So.2d 1193, 1195-96 (Fla.3d Dist Ct. App. 1995). It therefore is entirely logical to suppose that in referring to the "circuit court" in Section 102.168, the legislature intended to encompass the ordinary accouterments of appellate review of circuit court decisions. Thus, the statute itself supplies the necessary authority for review here.

Moreover, even if the Florida Supreme Court's authority was thought to stem from the Florida Constitution, not the statute, exercise of that authority still would not violate Article II. The threshold inquiry under Article II is whether the state Constitution "circumscrib[ed] the legislature's authority," and here the application of the Florida Constitution must be fully consistent with Article II because there is every indication that the Legislature intended to provide appellate review in contest actions, not eliminate it. Even applicants do not try to explain why the legislature would want to endow a single circuit judge with final authority to decide these cases. Instead, all indications are that the legislature intended this statute to be governed by the settled principle of Florida law that the state supreme court has appellate jurisdiction over all matters determined in the lower courts unless the legislature precludes such review. See, *e.g.*, *Leanard* v. *State*, 760 So.2d 114, 118

(Fla. 2000). That, of course, is a principle with which the Florida legislature is quite familiar.

For example, suppose that the Legislature had enacted a provision stating: "To promote expeditious resolution of election disputes, there shall be no appellate review of the decisions of circuit courts in contest actions." If the Florida Supreme Court had held that provision invalid under the Florida Constitution, an issue would then arise under Article II regarding the validity of the provision for contests of Presidential elections. But here, where the constitutional provision for appellate review supplements the Legislature's scheme -- much like judicial rules of procedure or evidence or principles of statutory construction -- and does not invalidate a choice made by the Legislature, the principle set forth in *McPherson* is not implicated. See 146 U.S. at 39-40; see also *id.* at 24-26.

2. Applicants also argue (at 23) that the decision below violates Article II for the separate reason that the Florida Supreme Court "substituted its judgment for that of the legislature" and "rewr[ote] th[e] statutory scheme" governing the appointment of presidential electors in a variety of different respects. Again, applicants make no plausible claim that Article II has been violated.

To begin with, this contention moves well beyond the sort of Article II claim that the Court hypothesized in *Bush*. There, the Court could not tell the basis for the Florida Supreme Court's ruling and sought clarification. If the Florida Supreme Court explained that it had relied upon the Florida Constitution, then this Court would proceed to assess the permissibility of that reliance under Article II.

Here, the Florida Supreme Court's opinion makes clear that it did not rely upon the Florida Constitution in construing the election law. See, *e.g.*, slip op. 5-6. The court based its interpretation on conventional tools of statutory construction, including relevant precedents; in other words, it engaged in routine statutory interpretation.

Applicants' argument here is thus either that the Florida Supreme Court misrepresented the basis for its decision – that the court said it was interpreting Florida statutory law but actually was not – or that Florida's highest court erred in interpreting Florida law. Either contention is squarely inconsistent with the "general rule" that "this Court defers to a state court's interpretation of state law." *Bush*, slip op. 4. Were this Court to adopt applicants' view of Article II, it would be required to second-guess every state law ruling by a state court to determine whether the lower court was attempting to disguise some other basis for decision or had just gotten the state law wrong.

Finally, as this Court is well aware, the process of statutory construction is the process of determining how to resolve issues that are not expressly addressed in the language of the statute. But applicants takes the position that Article II bars a court from engaging in this routine process: if an issue is not addressed in the language of the statute or in a prior decision that is precisely on point, then the court has engaged in "judicial meddling" or "usurpation of [the Legislature's] constitutionally delegated power." Nothing in Article II so limits the courts' authority, at least absent a specific limitation enacted by the legislature, and there is no such limitation here. Indeed, the fact that these provisions apply broadly to all elections confirms the Legislature's intent that courts exercise their usual role.

A discussion of the particular state law issues cited by applicants confirms that the decision below is a routine example of statutory construction that is entirely consistent with Article II, and that applicants' claims are nothing more than an attempt to reconsider these state law issues. Significantly, despite the division on the court below with respect to the relief granted, there was significant consensus with respect to the questions of statutory interpretation: six of the seven justices agreed on the statutory interpretation issues. Applicants' contentions before this Court consist principally of generalized assertions with little in the way of support.

First, applicants claim that the Section 102.168 contest action does not apply to Presidential elections. However, as the Florida Supreme Court explained (slip op. 6 n.7), applicant Bush, the Florida Legislature, and the Florida Secretary of State all took the position before that court that the contest action was available. Indeed, applicant Bush himself filed a third party complaint in the circuit court in this case invoking Section 102.168 with respect to the Presidential election.[2]

Second, applicants assert (Stay App. 26) that the court below "essentially overruled" two subsections of Section 102.166 by ordering a recount of less than all of the ballots cast. However, as the Florida Supreme Court explained, the Section 102.166 protest remedy is entirely separate from the Section 102.168 election contest remedy. Slip op. 13; see also id. at 61 (Harding and Shaw, JJ., dissenting) (agreeing that the two remedies are separate). And

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[2]The single case cited by applicants – *Fladell* v. *Florida Elections Canvassing Comm'n* – was vacated by the Florida Supreme Court, which expressly held that "the Court's rulings thereon are a nullity." See *Fladell* v. *Florida Elections Canvassing Comm'n*, Nos. 00-2372 & 00-2376, slip op. 4 (Fla. Sup. Ct. Dec. 1, 2000).

whatever the restrictions on the county canvassing boards' authority under Section 102.166, the Legislature granted the courts extraordinarily broad remedial authority in contest actions (see Section 102.168(8)), and it is that authority that is the basis for the determination below.

Third, contrary to applicants' contention (at 26), the court below did not rely on the prior opinion that this Court vacated in *Bush*. It merely pointed out that a canvassing board's failure to complete the recount by the date specified in the court's opinion did not forever bar the inclusion in the vote totals of any legal votes identified in that recount. Slip op. 34-35. Applicants' reference (at 26) to the Broward County votes is mystifying because the counting of those votes was not an issue in the court below.

Fourth -- and somewhat inconsistently – applicants (at 27) attack the Florida Supreme Court for refusing to go beyond the statutory standard for a legal vote and hold that indented ballots may never constitute legal votes. Here, the court's opinion simply recognizes the statutory test; it is difficult to understand how that could possibly violate Article II.

3. Applicants also assert (at 29-34) that the Florida Supreme Court's interpretations of Florida law constitute the application of "laws [not] enacted prior to the day fixed for the appointment of the electors" that will deprive Florida's electors of the protection of 3 U.S.C. § 5. Again, however, each of applicants' claims is just an attempt to revisit the Florida Supreme Court's interpretation of Florida law.

First, applicants again argue (at 30-31) that the Florida Supreme Court's decision curbs the discretion of canvassing boards. As the lower court held, however, canvassing boards exercise their authority under the protest provision, Section 102.166; the case now

before the Court involves an entirely separate remedy, a contest action under Section 102.168. In *Broward County Canvassing Board* v. *Hogan*, 607 So.2d 5087 (Fla. Dist. Ct. App. 1992), upon which applicants rely, the plaintiff's claim was that the canvassing board should have conducted a recount under Section 102.166; the plaintiff did not assert a claim to relief under the specific grounds set forth in the contest statute as respondent Gore did here under Section 102.168(3)(c).

Second, applicants again attack (at 31) the Florida court's definition of a legal vote. They seem to argue that the Florida Supreme Court was obligated to provide a definition more specific than the one set forth in the statute. But standards such as "intent" are well known in the law and nothing in 3 U.S.C. § 5 imposed an obligation of greater specificity.[3]

4. Applicants also have not shown the requisite probability of success on the merits of their equal protection claim. The decision of the court below does not present either of the situations that applicants have argued would raise concerns under the Equal Protection Clause.

To begin with, in their brief below, applicants argued primarily that, "[i]n a contest of a statewide election, a statewide recount is required by the Equal Protection Clause." See Amended Brief of Applicant Bush in *Gore v. Harris*, Fl. S. Ct. No. SC00-2431 at 44. The

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[3]Applicants point to the 1990 Palm Beach guidelines and other alleged definitions of legal votes. But the key question is whether those definitions are consistent with the statutory standard prescribed by the Legislature; no one would assert that simply because a standard had been promulgated by a canvassing board prior to the election it must be applied even if it violates the statute. And the relevant circuit court held that the Palm Beach standards did violate the statutory test. *Florida Democratic Party* v. *Palm Beach County Canvassing Board*, No. CL00-11078AB (Fla 15th Jud. Cir. Nov. 15, 2000).

decision of the Florida Supreme Court, of course, orders a statewide manual count of undervotes, see slip op. at 16-20, so this equal protection claim is not presented.

Faced with the loss of that argument, applicants now argue only that "the necessarily disparate manual recount" ordered by the Florida Supreme Court raises equal protection problems. See Stay App. at 35. But the premise of this argument simply does not obtain here because the Florida Court has ordered that a uniform, statewide standard, that required by the legislature, be used in counting the undervotes. See slip op. at 23-25 (explaining that, under longstanding interpretations of statutory law, ballots containing a "clear indication of the intent of the voter" constitute "legal votes" that must be counted). Because all the undervotes that will be manually counted will be counted under this same standard, there is nothing to applicants' equal protection claim.

Applicants also argue that Florida cannot treat voters in different counties differently. Stay App. 35. If applicants mean by this to say that every county must use precisely the same methods of tabulation as every other county in the State, they are obviously wrong. As they do in Florida, different counties within States routinely use different equipment and different ballots for the conduct of their elections. This plainly does not systematically "dilute" the votes of particular counties in any way that violates the Equal Protection Clause. The only decision applicants cite in support of their argument, *O'Brien* v. *Skinner*, 414 U.S. 524 (1974), involved incarcerated prisoners who were denied the right to vote altogether based solely on their county of residence. But *O'Brien* stands only for the unremarkable proposition that voters cannot be denied the right to vote solely because of their county of residence.

Indeed, even if the standard articulated by the Florida Supreme Court were interpreted slightly differently in different counties, permitting each county's canvassing board to conduct its portion of a statewide manual recount of undervotes would not work any impermissible discrimination. It would simply facilitate the completion of the count. The need for an orderly process of counting these votes would be sufficient to sustain against Equal Protection challenge the reasonable procedure of permitting each county to apply the standard set out by the Florida Court. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983) (with respect to regulation of elections, "State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions").

In any event, if the standard set out by the Florida Court is not applied consistently, applicants will have recourse to the Leon County Circuit Court and, on appeal, to the Florida Supreme Court, either of which will be able to eliminate any inconsistency by determining itself which ballots meet the statutory standard.[4]

The decisions cited by applicants are in any event inapposite. Although applicants mention "dilution," the cases they cite, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964), involve the one-person one-vote principle under which voters from different districts cannot be given votes of unequal "weight." This issue is not presented in an at-large election like the instant one where, although the elections are conducted by individual counties, the winner is determined based on his or her statewide

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[4]And, indeed, Florida statutory law provides that opportunity with regard to any ballots that a candidate believes should not have been counted during a manual recount pursuant to Fla. Stat. 102.166, see App. 36 (complaining about standards used during previous manual recounts). See Fla. Stat. 102.168 (3)(c) (permitting a candidate to contest the inclusion of "illegal votes" in the certified election results).

vote. When the State undertakes procedures to ensure that qualified voters' votes are counted, the previously counted votes are not, of course, "diluted" at all. And, as this Court has previously recognized, manual recount procedures are an ordinary mechanism for ensuring the accuracy of vote-counts in close elections. See *Roudebush* v. *Hartke*, 405 U.S. 15, 25 (1972) ("A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, § 4.").

5. Nor is there any prospect that applicants will prevail under the Due Process Clause of the Fourteenth Amendment. Applicants appear to argue that the Florida Supreme Court's decision violates the Due Process clause in two ways: first, because it improperly changes the law, and, second, because it requires that the manual recounts occur in the absence of clear standards.

To the extent that applicants' due process argument rests on the claim that the Florida Supreme Court imposed standards for counting the votes that were not in place when the votes were cast, that argument must fail for reasons already discussed above: the law enunciated in the Florida Supreme Court's opinion is the law as it existed on election day and long before it. In fact, this argument is particularly flawed in the due process context. To establish the charge of a constitutionally impermissible retroactive change in the law, applicants would have to demonstrate not simply that the Florida Supreme Court's decision constituted a retrospective change and that the change deprived them of a cognizable liberty or property interest, but also that the change was "arbitrary and irrational." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); see also *id.* at 537 (plurality opinion of O'Connor, J.) (same); *id.* at 556 (Breyer, J.,

dissenting) (same). But applicants allege *none* of the elements of such a claim, for understandable reasons. Not only does the Florida Supreme Court's decision not represent a change in the law, *see supra*, but it would take an exceptional showing of unfair retroactive effect to hold a court decision (as opposed to a legislative enactment) violative of due process: court judgments are normally retrospective in light of their application to the parties to the case, and the Fourteenth Amendment has never been suggested to require otherwise.

Indeed, this Court's decisions reflect the strong presumption, consistent with this Court's understanding of the nature of the judicial act, that judicial rulings (again, in contrast to legislative enactments) must be retrospectively applied to the parties themselves. See, *e.g.*, *Harper* v. *Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993); see *id.* at 107-08 (Scalia, J., concurring). The appellate decisions on which applicants relies for his assertion that the decision below has impermissible retroactive effect are simply inapposite. In both *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970), and *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), election officials retroactively changed an electoral practice on which voters and candidates had relied at the time of the election.

As for applicants' claim that the Florida court's decision did not provide sufficient guidance for its standards to pass due process muster, both the court's decision and the subsequent circuit court actions to implement that decision belie applicants' claim. In its decision, the Florida Supreme Court offered a clear standard – one that has been in place in Florida and countless other states for years: "the standards to be employed is that established by the Legislature in our Election Code which is that the vote shall be counted as a 'legal' vote if there is 'clear indication of the intent of the voter.'" Slip op. 40. The Florida

canvassing boards and courts have long implemented that standard, and vote totals certified in this and many previous elections reflect countless ballots manually recounted under this standard.[5]

The cases applicants cite do not suggest a contrary result. In *Duncan v. Poythress*, 657 F.2d 691 (1981), the Fifth Circuit agreed with the First Circuit that a due process violation could be found where "'the election process reaches the point of patent and fundamental unfairness.'" *Id.* at 703 (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978)). Of note, both the First and Fifth Circuits explicitly recognized that the circumstances giving rise to a due process violation would have "to go well beyond the ordinary dispute over the counting and marking of ballots," and that precedent established that federal courts would not "enter into the details of the administration of the election." *Id.* The First and Fifth Circuits found a sufficiently flawed electoral process only where the state encouraged voters to proceed by absentee ballot but then retroactively invalidated those ballots, and where it failed entirely to hold an election required by law. *Id.*

Indeed, applicants' arguments that the judgment of the Florida Supreme Court violates due process because it is "in its basic aspect * * * flawed" and permits effectively standardless recounts are nothing more than claims that the contest and recount procedures of Florida's election code, which mirror those that have long existed in one form or another in numerous States are on their face unconstitutional. There is no way of rationalizing their position with the fact that the manual counting of ballots under the identical standard has

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[5] Indeed, under applicants' due process theory, the already certified results must be constitutionally infirm to the extent that they include any ballots manually recounted under Florida's longstanding standard.

been the *rule*, not the exception, in this country for most of the period since its founding. And their argument would have the logical consequence that the entire election in Florida, in which many ballots have been included in the certified totals to date only after manual counting, would have to be declared invalid.

CONCLUSION

The application for a stay should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
Petitioners,

v.

ALBERT GORE, JR., *et al.*,
Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court erred in establishing new standards for resolving presidential election contests that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

2. Whether the Florida Supreme Court erred in establishing post-election, judicially created standards that threaten to overturn the certified results of the election for President in the State of Florida and that fail to comply with the requirements of 3 U.S.C. § 5, which gives conclusive effect to state court determinations only if those determinations are made "pursuant to" "laws enacted prior to" election day.

3. Whether the use of arbitrary, standardless and selective manual recounts to determine the results of a presidential election, including post-election, judicially created selective and capricious recount procedures that vary both across counties and within counties in the State of Florida, violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceeding in the court below:

Governor George W. Bush, as Nominee of the Republican Party of the United States for President of the United States; Richard Cheney, as Nominee of the Republican Party of the United States for Vice President of the United States; Albert Gore, Jr., as Nominee of the Democratic Party of the United States for President of the United States; Joseph I. Lieberman, as Nominee of the Democratic Party of the United States for Vice President of the United States; Katherine Harris, as Secretary of State, State of Florida; Katherine Harris, Bob Crawford, and Laurence C. Roberts, individually and as members of the Florida Elections Canvassing Commission; the Miami-Dade County Canvassing Board; Lawrence D. King, Myriam Lehr and David C. Leahy as members of the Miami-Dade Canvassing Board; David Leahy individually and as Supervisor of Elections; the Nassau County Canvassing Board; Robert E. Williams, Shirley N. King and David Howard (or, in the alternative Marianne P. Marshall), as members of the Nassau County Canvassing Board; Shirley N. King individually and as Supervisor of Elections; the Palm Beach County Canvassing Board; Theresa LePore, Charles E. Burton and Carol Roberts, as members of the Palm Beach Canvassing Board; Theresa LePore individually and as Supervisor of Elections; and Stephen Cruce, Teresa Cruce, Terry Kelly, Jeanette K. Seymour, Matt Butler, John E. Thrasher, Glenda Carr, Lonnette Harrell, Terry Richardson, Gary H. Shuler, Keith Temple, and Mark A. Thomas, as Intervenors.

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BRIEF FOR PETITIONERS

On December 4, 2000, this Court unanimously vacated the Florida Supreme Court's November 21 judicial revision of Florida's election laws. *Bush v. Palm Beach County Canvassing Board*, No. 00-836 (U.S. Dec. 4, 2000). The Court remanded for further proceedings not inconsistent with its concerns regarding the Florida court's awareness of and compliance with federal constitutional and statutory constraints on the authority of the Florida judiciary to revise the Florida Legislature's method for appointing presidential electors. *Id.*

Just four days later, *without a single reference to this Court's December 4 decision*, the majority of the Florida Supreme Court announced sweeping and novel procedures for recounting selected Florida ballots to determine anew the winner of the November 7 presidential election in Florida. This latest manual recount regime would be conducted according to varying—and unspecified—standards, by officials unspecified in Florida's election law, and according to an ambiguous and apparently unknowable timetable. The Florida court's wholesale revision of Florida statutory law, adopted in part to address the problems flowing from its earlier abandonment of the system crafted by the Florida Legislature, ignores the obviously intertwined nature of the protest and contest provisions and overrides numerous legislative choices embodied in the Florida Election Code.

The decision below acknowledges, but fails to adhere to, Article II, § 1, cl. 2 of the federal Constitution, which vests plenary and exclusive authority in the Florida Legislature to determine the manner of selecting Florida's electors. And, while the Florida court stated that it was "cognizant" of 3 U.S.C. § 5, which creates a "safe harbor" allowing a State to afford conclusive effect to its choice of presidential electors, it completely rewrote the Florida Legislature's pre-election laws designed to take advantage of that provision. The court's

newly devised scheme for re-tabulating votes is plainly arbitrary, capricious, unequal, and standardless.

The court below not only failed to acknowledge that its earlier decision had been vacated, it openly relied on manual recounts that had occurred *only* because of that opinion as a predicate for changing the Secretary of State's certification of the election and as the foundation for its state-wide recount plan. It compounded that manifest overreaching by overriding its own "equitable" deadlines, created two weeks ago, as well as the legislature's carefully wrought timetable.

The Florida court's decision imposes its decree on counties that were never part of the proceedings below, overrides statutory authority explicitly vested in the state's chief election officer and local canvassing boards, designates new officials to supervise in place of the officials specified in Florida's election code to discharge that function, establishes a standard for the instigation of recounts not recognizable under Florida law, requires manual recounts of "under-voted" but not "over-voted" ballots, and mandates inconsistent recounts within certain counties, in violation of fundamental principles of equal protection and due process.

The unconstitutional flaws in the Florida Supreme Court's judgment immediately bore further unconstitutional fruit when the trial court attempted to implement the supreme court's decision, which effectively mandated the creation of an entirely new set of arbitrary and unreviewable *ad hoc* procedures that are flatly incompatible with the legislature's judgments regarding the conduct and timing of manual recounts and its delegation of authority to the Secretary of State to ensure uniformity in election procedures. *See* Petitioners' Supplemental Mem. In Support Of Emergency Application, No. 00A-504 (filed Dec. 9, 2000). The trial court explicitly acknowledged it was creating a two-tier system, one for Dade County and one for "the rest of the counties in the state." Hearing Tr. at 5 (attached to Petition-

ers' Supplemental Mem.). In the interest of making the recounts "go as smoothly as possible," the trial court precluded parties from objecting to the interpretation or allocation of individual ballots in the course of the recounts. *Id.* at 8. The trial court called for county canvassing boards throughout the state to create new "protocols" for the recounts. *Id.* And the trial court explicitly acknowledged that there were to be no specific, uniform standards to guide the recounts. *Id.* at 10.

This case is the quintessential illustration of what will inevitably occur in a close election where the rules for tabulating ballots and resolving controversies are thrown aside after the election and replaced with judicially created *ad hoc* and *post hoc* remedies without regard for uniformity, objectivity, or finality. The Florida Supreme Court has not only violated the Constitution and federal law, it has created a regime virtually guaranteed to incite controversy, suspicion, and lack of confidence not only in the process but in the result that such a process would produce.

OPINIONS BELOW

The opinion of the Supreme Court of Florida below (Pet. App. 1a-56a) is not yet reported. The order of the Circuit Court for the County of Leon, Florida (Pet. App. 57a) is not reported. The November 21, 2000 opinion of the Supreme Court of Florida in *Palm Beach County Canvassing Board v. Harris* (Pet. App. 66a-100a), is reported at So. 2d, 2000 WL 1725434 (Fla. Nov. 21, 2000).

JURISDICTION

The judgment of the Supreme Court of Florida was entered on December 8, 2000. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(a). *See* Applic. for Stay, No. 00A504, at 16-19. Petitioners seek reversal of the Supreme Court of Florida's decision, which, as ex-

plained below, violates Article II of the United States Constitution, 3 U.S.C. § 5, and the Fourteenth Amendment to the Constitution, and irreconcilably conflicts with this Court's decision in *Bush v. Palm Beach County Canvassing Board*, No. 00-836 (Dec. 4, 2000).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional and statutory provisions are set forth at Pet. App. 127a-145a.

STATEMENT OF THE CASE

According to the initial count and statutory recounts of the Florida election results, Governor Bush received more votes for President than did Vice President Gore. Nevertheless, more than a month after the November 7 presidential election, the outcome of that election remains shrouded in uncertainty, confusion, and intense controversy. The thirty-three days since the election have been characterized by widespread turmoil resulting from selective, arbitrary, changing, and standardless manual recounts of ballots in four Florida counties pursuant to requests made on behalf of Democratic presidential candidate Vice President Gore. The tide of litigation flowing from that fatally flawed process has resulted in decisions of the Florida Supreme Court that rewrite substantial portions of Florida's Election Code in a dramatic and unconstitutional departure from the scheme enacted by the legislature—a departure that threatens Florida's ability to obtain the finality and certainty that the Florida Legislature intended to achieve and that compliance with 3 U.S.C. § 5 provides.

A. Florida's Election Laws As Of November 7

Prior to November 7, 2000, pursuant to the authority conferred on it by Article II of the United States Constitution and 3 U.S.C. § 5, the Florida Legislature had en-

acted a comprehensive and carefully interwoven statutory plan and set of procedures and timetables to govern the appointment of presidential electors, the conduct of elections, and the timely resolution of disputes and controversies related thereto.

Shortly after a presidential election, each Florida county's canvassing board is responsible for counting and certifying the election returns and forwarding them to the Florida Department of State. Fla. Stat. § 102.141. Florida's Secretary of State "is the chief election officer of the State" with responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Fla. Stat. § 97.012(1). "[A]s soon as the official results are compiled from all counties," the statewide Elections Canvassing Commission—comprising the Governor, the Secretary of State, and the Director of the Division of Elections—is required to "certify the returns of the election and determine and declare who has been elected for each office." Fla. Stat. § 102.111(1).

The legislative scheme contains two provisions mandating that local county canvassing boards must certify their election returns to the Department of State no later than 5:00 p.m. on the seventh day following the election. Fla. Stat. §§ 102.111, 102.112. Section 102.112 further provides that returns filed after that deadline "may" be ignored by the Secretary of State.

Florida law provides that, prior to the seven-day certification deadline, disputes over election results may be raised by submitting a "protest" to the county canvassing boards, *see* Fla. Stat. § 102.166(1)-(2), and/or a request for a manual recount, *id.* § 102.166(4)-(10). The county canvassing boards have the discretion to reject or accept the request for a recount. *Id.* § 102.166(4)(c). If the canvassing board decides to perform a manual recount, it may first conduct a sample manual recount. *Id.* § 102.166(4)(d). If the sample manual recount indicates "an error in the vote tabulation which could affect the

outcome," the county canvassing board may correct the error and recount remaining precincts with the vote tabulation system, request verification of the tabulation software, or "[m]anually recount all ballots." *Id.* § 102.166(5).

If the canvassing board chooses to embark on a manual recount, the board "shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots," Fla. Stat. § 102.166(7)(a), and "[i]f the counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent," *id.* at (7)(b).

B. State Court Proceedings Leading To Extension Of The Certification Deadline

Although both the initial results of the November 7 election and a statewide machine recount of the ballots showed that Governor Bush and Secretary Cheney had received the most votes in the presidential election in Florida, a manual recount in four selected counties was requested on behalf of Vice President Gore and Senator Lieberman (the "Gore respondents"). On November 13, 2000, respondent Gore and others brought suit in state court, seeking to compel the Secretary of State to waive the November 14 deadline established by Florida statutes for certifying Florida's presidential election results. That suit sought to require the inclusion in certified totals of the results of manual recounts then contemplated or ongoing in Broward, Miami-Dade, and Palm Beach Counties. The circuit court denied that relief on November 17, concluding that the Secretary of State had exercised "reasoned judgment" in declining to accept late returns.

On November 21, the Florida Supreme Court reversed the circuit court and declared for the first time in Florida law that "the Secretary may reject a Board's amended returns only if the returns are submitted so late

that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process." Pet. App. 97a. The Florida Supreme Court accordingly directed the Secretary of State to accept untimely manual recount returns through 5:00 p.m. on November 26, 2000—twelve days after the statutory deadline—and directed the Secretary to include in her certifications all manual recount returns received by that date. *Id.* at 99a.

Manual recounts thus occurred after November 14 to varying degrees in Broward, Palm Beach, and Miami-Dade counties, and results from Broward County's manual recount were submitted to the Secretary of State on November 25. Pet. App. 116a. On November 22, the Miami-Dade County Canvassing Board unanimously decided to halt its manual recount, after counting only 136 of the 635 precincts in the county. *Id.* at 59a. The Palm Beach Canvassing Board began a manual recount, but did not complete its work by the 5:00 p.m. November 26 deadline set by the Florida Supreme Court. The Board instead submitted partial returns at that time and later supplemented them. *Id.* at 60a.

As of 5:00 p.m. on November 26, the tabulated results showed *for the third time* that Governor Bush had received the most votes for President. Accordingly, the Secretary of State certified those returns and the Election Canvassing Commission declared Governor Bush the winner of Florida's presidential election.

C. This Court's Prior Decision

On November 22, Governor Bush filed a petition for certiorari seeking review in this Court of the Florida Supreme Court's November 21 decision. On December 4, 2000, this Court issued a unanimous *per curiam* opinion, vacating that decision and remanding the case "for further proceedings not inconsistent with this [Court's] opinion." *Bush*, slip op. at 6. This Court decided "to decline *at this time* to review the federal questions"

raised by petitioners because of uncertainty as to the grounds for the decision below. *Id.* (emphasis added). But this Court cautioned the court below against overriding the Florida Legislature's "wish" to secure for Floridians the benefits of the "safe harbor" accorded by 3 U.S.C. § 5, *see Bush*, slip op. at 6, and expressly directed the court below to explain "the extent to which [it] saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2" and "the consideration [it] accorded to 3 U.S.C. § 5." *Id.* at 7. The Florida Supreme Court has not yet issued an opinion in that case on remand.

D. The Election Contest

Candidates and voters are permitted by Florida law to "contest" the certification of an election by filing a complaint in circuit court. *See* Fla. Stat. §§ 102.168, 102.168(5). Such contests must be initiated within 10 days of the certification, *see* Fla. Stat. § 102.168(2), and involve judicial proceedings, including formal pleadings, discovery, and trial. Fla. Stat. § 102.168(3)-(8).

On November 27, 2000, the day after Governor Bush was certified as the winner of the November 7 presidential election in Florida, the Gore respondents filed a complaint in the Circuit Court for Leon County to contest that certification. Like the earlier protest actions, the complaint sought relief primarily with respect to a handful of heavily Democratic counties. The complaint alleged that the results certified by the Secretary of State improperly (1) failed to include a partial manual recount of ballots in Miami-Dade County; (2) failed to include untimely results of a manual recount in Palm Beach County; and (3) included the results from Nassau County's original machine count of ballots. The Gore respondents further asked the court to evaluate ballots in Palm Beach County and Miami-Dade County that the Gore respondents contended were not properly counted. In response, Governor Bush and Secretary Cheney ar-

gued *inter alia* that the relief sought by the Gore respondents would violate federal statutes and the United States Constitution. *See, e.g.*, Pet. App. 110a-117a, 120a-121a, 125a-126a.

On December 4, 2000, following a two-day trial, the circuit court rejected the Gore respondents' claims. The court found that there was no credible evidence establishing a reasonable probability that the Florida election results would be different if the requested relief were granted to the Gore respondents; that the Miami-Dade County Canvassing Board did not abuse its discretion in deciding not to perform a complete manual recount; and that the Palm Beach County Canvassing Board did not abuse its discretion in determining that the 3,300 ballots the Gore respondents sought to have reviewed again by the circuit court were non-votes. Pet. App. 61a-62a. The circuit court also found that the Palm Beach County "process and standards [for evaluating ballots] were changed from the prior 1990 standards," and noted that these changes were "perhaps contrary to Title III, Section (5) of the United States Code." *Id.* at 62a-63a.[1]

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[1] That factual finding was supported by substantial evidence presented during the trial below. For example, Judge Burton, Chairman of the Palm Beach County Canvassing Board, admitted that when the first ballots were subject to a sample manual recount on November 11, the canvassing board used its existing 1990 guidelines mandating that if a "chad . . . is fully attached, bearing only an indentation, [it] should not be counted." Trial Transcript, *Gore v. Harris*, No. 00-2808, at 238, 239, 240 (Fla. Cir. Ct. Dec. 2-3, 2000) ("Trial Tr."). Judge Burton testified that during the sample recount, the canvassing board changed to the "Sunshine Rule," *id.* at 240 (defining "Sunshine Rule" as "any light that was coming through any indentation on a ballot"), and then back again to the 1990 standard. *Id.* at 242. According to Judge Burton, the Board eventually abandoned *any* semblance of a *per se* rule. *Id.* at 245. Ultimately, a court or-

The circuit court expressed its concern that implementing a different standard for evaluating ballots during the contest proceeding would create a two-tier system not only within certain counties, but also with respect to other counties. Citing an opinion letter from Florida's Attorney General, the circuit court explained that such a system "would have the effect of treating voters differently depending upon what county they voted in .... [thereby raising] legal jeopardy under both the United States and state constitutions." Pet. App. 63a (citation omitted).

The evidence before the trial court revealed that the lack of any specific guidance for determining whether a particular ballot reflected a vote, *see* Fla. Stat. § 101.5614(5), led to wide discrepancies across and within Florida counties regarding the evaluation of ballots in a manual recount. Indeed, standards often varied even from one canvassing board member to another in the same county.[2]

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dered the canvassing board to consider "dimpled" chads even though the pre-existing 1990 policy precluded treating mere indentations as valid votes, *see Florida Democratic Party v. Palm Beach County Canvassing Bd.*, No. CL 00-11078-AB, 2000 WL 1728721 (Fla. Cir. Ct. Nov. 22, 2000), and even though a sample ballot provided in each voting booth instructed voters to: "check your ballot card to be sure your voting selections are clearly and cleanly punched and there are no chips left hanging on the back of the card." *Touchston v. McDermott*, No. 00-15985, 2000 WL 1781942, at *6 n.19 (11th Cir. Dec. 6, 2000) (Tjoflat, J., dissenting).

[2] For example, according to a monitor in Miami-Dade County, there were four different standards applied by three different canvassing board members. Judge King determined that every "dimpled or pregnant chad ... was a vote," Trial Tr. 497, whereas Judge Lehr looked for any indication of chad separation. *Id.* at 497, 499. Supervisor Leahy switched from looking for a "two point" hanging chad during the sam-

The evidence before the trial court also revealed the substantial degradation of ballots caused by manual handling. Ballot fragility was most plainly evident in Miami-Dade, which attempted to undertake a selective recount during the judicially-extended protest period. Miami-Dade used machines in the first instance to segregate "no vote" ballots. Trial Tr. 479. That process demanded the constant stopping and starting of the ballot-counting machines, and frequent manual treatment of ballots was necessary to retrieve non-votes, clear jams, and process the ballots. *Id.* at 484, 485. The rough handling led to approximately *1,000 chads per day* being dislodged from ballots. *Id.* at 506.

E. The Florida Supreme Court's Decision

On December 8, 2000, a 4-3 majority of the Florida Supreme Court reversed the circuit court and announced the creation of a complex, non-uniform, and novel system for further manual recounts. The majority held that canvassing board decisions were not "to be accorded the highly deferential 'abuse of discretion' standard" after the protest period. Pet. App. 13a. Despite that ruling, and without review of the ballots, the majority directly *ordered* the inclusion of (1) 176 or 215 net votes for the Gore respondents as "identified" by the Palm Beach Canvassing Board,[3] and (2) 168 net votes for the Gore respondents "identified in the partial recount" by the Miami-Dade Canvassing Board but not submitted for certification. Pet. App. 3a-4a. All of these ballots were

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ple recount, *id.* at 499, to the "Sunshine Rule" described above. *Id.* at 497. These standards also differed from the standards used in Palm Beach County.

[3] The court directed the trial court to determine whether 176 or 215 was the correct number. Pet. App. 4a n.6.

counted *after* the November 14 deadline.[4] Furthermore, the majority ordered the *trial court* "to immediately tabulate by hand the approximately 9,000 Miami-Dade ballots," *id.* at 33a, yet ordered the *supervisors of elections and canvassing boards* "in all counties that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith," *id.*[5]

The majority opinion did not acknowledge or respond to this Court's December 4 opinion vacating the November 21 decision, nor did it explain how its newly fashioned directives complied with 3 U.S.C. § 5's time limit. The majority conceded, however, that the "need for prompt resolution and finality is especially critical in presidential elections where there is an outside deadline established by federal law," Pet. App. 31a, and that "because the selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, *the Florida election law scheme must yield in the event of a con-*

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[4] These votes were thus untimely under the statutory deadline, and were included only by virtue of the supreme court's improper reliance on its vacated November 21 opinion.

[5] The majority's decision thus has the effect of subjecting Miami-Dade County to an arbitrary double standard. The results from a *full* manual recount of all ballots from 20 percent of its precincts (the most heavily Democratic, in which Vice President Gore received about 75% of the vote) were ordered included in the totals, but the ballots from the remaining 80 percent of the county's precincts (many of which are more heavily Republican) would have only "undervotes" manually counted. Chief Justice Wells, in his dissent, expressed concern about this effect, because "not to count all of the ballots if any were to be recounted would plainly be changing the rules after the election and would be unfairly discriminatory against votes in the precincts in which there was no manual recount." Pet. App. 44a.

flict." *Id.* at 16a n.11 (emphasis added). The court nonetheless created and imposed a novel recount plan that could not be completed in a timely and orderly manner and that would, by definition, conflict with 3 U.S.C. § 5. *See* Pet. App. 32a n.21 ("we agree that practical difficulties may well end up controlling the outcome of the election"); *id.* at 56a (Harding, J., dissenting) (majority "provid[ed] a remedy which is impossible to achieve and which will ultimately lead to chaos").

Nor did the majority explain how its judgment could be reconciled with the constitutional and federal law claims raised by petitioners below. *See, e.g.*, Pet. App. 109a-110a (equal protection and due process); Pet. App. 110a (Article II and 3 U.S.C. § 5). As Chief Justice Wells wrote in dissent, Florida's "[c]ontinuation of [a] system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns . . . ." Pet. App. 43a-44a. He also concluded that directing the trial court to conduct a manual recount of the Miami-Dade County ballots violates Article II of the federal Constitution, in that "neither th[e Florida Supreme] Court nor the circuit court has the authority to create the standards by which it will count the undervoted ballots." *Id.* at 45a. Chief Justice Wells also expressed concern that "in a presidential election, the Legislature has not authorized the courts of Florida to order partial recounts, either in a limited number of counties or statewide," *id.* at 46a, and that "there is uncertainty as to whether the Florida Legislature has even given the courts of Florida any power to resolve contests or controversies in respect to presidential elections." *Id.* at 49a. In addition, Chief Justice Wells cautioned that "manual recounts by the canvassing board[s] are constitutionally suspect." *Id.* at 43a n.28.[6]

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[6] Chief Justice Wells further noted that "[a] continuing problem with these manual recounts is their reliability. It only stands to reason that many times a reading of a ballot by

Although the majority announced that "every citizen's vote be counted whenever possible," Pet. App. 17a, and that it was the Florida Supreme Court's duty to "see that every citizen's vote be counted," *id.* at 17a n.12, the majority held that "a final decision as to the result of the statewide election should only be determined upon consideration of the legal votes contained within the undervote or 'no registered vote' ballots of all Florida counties, as well as the legal votes already tabulated." *Id.* at 18a. As Chief Justice Wells pointed out in his dissent, the majority ignored the fact that "overvotes" as well as "undervotes" result in a vote not being counted. *Id.* at 38a-39a n.26 (Wells, C.J., dissenting) ("It seems patently erroneous to me to assume that the vote-counting machines can err when reading undervotes but not err when reading over-votes.").[7]

The majority directed the trial court "to enter such orders as are necessary to add any legal votes to the statewide certifications," Pet. App. 33a, and instructed

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a human will be subjective [and] [t]his subjective counting is only compounded where no standards exist or, as in this statewide contest, where there are no statewide standards for determining voter intent by the various canvassing boards, individual judges, or multiple unknown counters who will eventually count these ballots." Pet. App. 47a-48a.

[7] The majority's reasoning about "undervotes," appears to be that any mark on a ballot—such as a dimpled indentation—reflects an intent to vote, even if it is not counted by a machine. If that premise is accepted, then all of the machine-counted votes would also have to be examined manually so that ballots that include two "votes" for President can be excluded from the totals. The majority failed to address this logical extension of its reasoning, which, as the evidence before the trial court demonstrated, actually occurred. Trial Tr. 512-13 (witnessing instances where machine-counted vote included in totals also contained a "dimple vote" for another candidate).

that during the recounts, the standard to be applied in determining whether a vote is "legal" is whether there is a "clear indication of the intent of the voter." *Id.* at 34a (citing Fla. Stat. § 101.5614(5)). The majority provided no further guidance to the trial court, refusing to make provision for, among other things, "the qualifications of those who count," "whether a person may object to a counter," "what standards are used in the count," "the effect of differing intra-county standards," or "how one objects to the count." *See id.* at 48a (Wells, C.J., dissenting). Chief Justice Wells expressed his concern that the majority's prolongation of "this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis." *Id.* at 35a.[8]

In the wake of the majority's decision, the trial court implemented the supreme court's mandate by issuing orders near midnight on December 8 regarding how the recount would proceed. It ordered that by 8:00 a.m. December 9, 64 county canvassing boards were to begin segregating their "undervotes" with a goal of completing a recount by 2:00 p.m. on Sunday, December 10. Hearing Tr. 5, 7, 9 (attached to Petitioners' Supplemental Mem. In Support Of Emergency Application, No. 00A-504 (filed Dec. 9, 2000)). The trial court did not establish any uniform, statewide method for identifying and segregating undervotes, nor did it provide any instruction to avoid double counting previously counted ballots. Instead, it merely ordered each canvassing board to develop "some indication of the protocol purported or proposed" to segregate undervotes by noon on Saturday,

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[8] Both dissents also pointed out that the majority's decision departs from the law as it existed on November 7. *See* Pet. App. 35a (Wells, C.J., dissenting) (majority's decision "has no foundation in the law of Florida as it existed on November 7, 2000"); *id.* at 55a (Harding, J., dissenting) ("the majority has established standards for manual recounts—a step that this Court refused to take in an earlier case").

December 9, 2000. *Id.* at 8. The trial judge instructed that the recount was to be conducted by some combination of judges, canvassing board employees, and "such other public officials" as the various counties deemed necessary in light of the schedule. *Id.* at 8-9. The trial court called upon judges in other counties to assist in the recount in order "to give *some* objectivity and partiality [sic] to the process itself, to reduce, to the extent possible any objections to the manner in which [the recount] was conducted." *Id.* at 9 (emphasis added). The trial court, however, expressly forbade objections to the vote recounts as they occurred, although observers could take notes and (in theory only) submit written objections later. *Id.* at 8-9.

The events that occurred in the wake of the majority's decision thus closely mirrored Justice Harding's warning: "Even if such a recount were possible, speed would come at the expense of accuracy, and it would be difficult to put any faith or credibility in a vote total achieved under such chaotic conditions." Pet. App. 55a (dissenting opinion).

SUMMARY OF ARGUMENT

I. The new standards, procedures, and timetables established by the Florida Supreme Court for the selection of Florida's presidential electors are in conflict with the Florida Legislature's detailed plan for the resolution of election disputes. The court's new framework thus violates Article II, § 1, cl. 2 of the United States Constitution, which vests in state legislatures the *exclusive* authority to regulate the appointment of presidential electors. *See McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

A. The multiple ways in which the Florida Supreme Court's decision has cast aside provisions of the statutory scheme governing elections also constitute violations of Article II, § 1 because they usurp the legislature's exclusive authority. These judicial departures include: the elimination of the Secretary of State's author-

ity to maintain uniformity in application of the election laws; disregard for the statutory provisions that require manual recounts to include "all" ballots; the substitution of courts for canvassing boards in determining ballot validity; and the imposition of *de novo* judicial review by courts of canvassing boards' certified judgments.

B. Because state constitutions cannot alter Article II's direct and exclusive grant of authority to legislatures, and because the Florida Legislature did not delegate to it the power to do so, the Florida Supreme Court did not have jurisdiction or authority to decide this case. The Florida Legislature has granted jurisdiction over election contests only to Florida circuit courts.

C. The Florida Supreme Court's decision repeatedly relies on its November 21 decision, which this Court had already vacated, and the consequences of that decision. This magnifies the Article II violations that the November 21 decision produced.

II. The Florida Supreme Court's revision of Florida's statutory system for resolving election disputes also violates 3 U.S.C. § 5, which gives conclusive effect to determinations of controversies or contests concerning the appointment of electors only if those determinations are made "pursuant to" "laws enacted prior to" election day and within the federally mandated December 12 deadline.

Section 5 is intended to "assure" States of "finality" in the determination of their presidential electors, and this Court has already cautioned the Florida Supreme Court "against any construction of [state law] that Congress might deem to be a change in the law." *Bush v. Palm Beach County Canvassing Board*, No. 00-836, slip op. at 6.

Although the court below acknowledged to the "stringent calendar controlled by federal law," Pet. App. 16a n.11, it ignored federal law altogether by imposing multiple changes on the statutory system for resolving

election disputes. Among other things, the Florida Supreme Court provided an extraordinary remedy that has no statutory basis, and its novel exposition of the contest provision essentially reads out other more specific provisions in Florida's Election Code.

III. The new set of manual recount procedures concocted by the Florida Supreme Court is arbitrary, standardless, and subjective, and will necessarily vary in application, both across different counties and within individual counties, in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

A. The Equal Protection Clause forbids the state from treating similarly situated voters differently based merely on where they live. *See, e.g., O'Brien v. Skinner*, 414 U.S. 524 (1974). Yet the various manual recounts ordered by the Florida Supreme Court will *necessarily* result in such differential treatment in violation of the Equal Protection Clause. The lack of uniform standards for counting "votes" means that voters who cast identical ballots in different counties will likely have their ballots counted differently. This is also true of the completed manual recounts that the Florida Supreme Court has compelled, or attempted to compel, the Secretary of State to include in the certified election results.

The new multi-tier recount scheme ordered by the court imposes several inherently different standards that also violate equal protection guarantees. It includes all newly identified "votes" from about one-fifth of the precincts in Miami-Dade County, but only orders the recount of a fraction of ballots identified as "under-votes" from the other 80 percent of the county. And, while solicitous of under-votes, the decision does nothing to account for "over-votes" in the machine count (which are also recorded as non-votes). Furthermore, by adopting varying levels of deference to the conclusions of different county canvassing boards, the court introduces even greater disparities in treatment.

B. Due process requires the application of clear and consistent guidelines based on prospective rules. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Yet the Florida Supreme Court's new election procedures are retroactive and anything but clear and consistent. In fact, they substantially deviate from practices established before election day. Changing the legal status of ballots after the election on the basis of selective, subjective, standardless, and shifting methods of manual recounting is fundamentally unfair. *See Roe v. Alabama*, 43 F.3d 574, 581 (11th Cir. 1995). Under the particular circumstances imposed by the court for the manual recounts, due process is further compromised because ballots are inevitably degraded during repeated machine inspection of ballots to segregate under-votes and by the manual recounts themselves. Moreover, the prescribed procedures adopted to implement the Florida Supreme Court's judgment deny parties any meaningful opportunity to object to subjective ballot determinations or to receive judicial review of those determinations. Finally, the Florida Supreme Court has also fundamentally changed the meaning and legal consequences of vote certification.

ARGUMENT

I. The Decision Of The Florida Supreme Court Violates Article II Of The Constitution

The Constitution expressly grants the legislatures of the several States plenary power over the appointment of electors, directing that electors shall be chosen "in such Manner as the Legislature thereof may direct." U.S. CONST. art. II, § 1, cl. 2. As this Court has recognized, the Constitution "leaves it to the legislature *exclusively* to define the method of effecting the object [of appointing electors]." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (emphasis added). Indeed, the Framers' "insertion of those words" in Article II—"in such Manner as

the Legislature . . . may direct"—undeniably "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Bush*, slip op. at 4-5 (quoting *McPherson*, 146 U.S. at 25).

The Florida Legislature enacted a carefully crafted statutory scheme to govern the appointment of presidential electors. In so doing, "the legislature [was] not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush*, slip op. at 4. By rewriting that statutory scheme—thus arrogating to itself the power to decide the manner in which Florida's electors are chosen—the Florida Supreme Court substituted its judgment for that of the legislature in violation of Article II. Such a usurpation of constitutionally delegated power defies the Framers' plan. The Florida Legislature never authorized judicial revision of the legislative structure it so meticulously conceived. Indeed, notwithstanding the rote incantation by a majority of the court below of the paramount role of the state legislature in this field, the court's key conclusions were simply pronounced without even the pretense of any statutory support.

This Court has recognized that the legislature's Article II power of appointment is exclusive. *See McPherson*, 146 U.S. at 34-35 ("'The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states.'") (quoting with approval S. Rep., 1st Sess., 43d Cong., No. 395). Indeed, the Constitution contains provisions that vest responsibility in the States *qua* States, *e.g.*, U.S. CONST. art. I, § 8, cl. 16, as well as provisions that, as here, single out the particular branch of state government charged with exercising certain duties integral to the functioning of the federal government, *e.g.*, U.S. CONST. art. I, § 2, cl. 4. In light of the Constitution's precise distinctions among state legislative, executive, and judicial powers, the Framers' decision to vest specific authority in state legislatures

must be understood to be exclusive of state executive or judicial power to prescribe the "manner" of appointing electors. Thus, in the absence of a clear and express delegation of the appointment power by the legislature to a coordinate branch of government, the Constitution bars the exercise of that power by any other branch.

A. The Decision Below Overrides Numerous Provisions Of Florida Election Law

The decision below overrides numerous provisions of the detailed and specific statutory scheme enacted by the Florida Legislature. The resulting, judicially promulgated election scheme not only flies in the face of the specific language of the contest statute but also renders all but irrelevant the detailed statutory provisions addressing when and how canvassing boards may conduct manual or other recounts—including the requirement that any such recount must include "all ballots"—and the Secretary of State's duty and authority to ensure *uniformity* in the operation of the election laws by issuing opinions that are binding on the canvassing boards, the only bodies statutorily authorized to "count" votes. That new, judicially promulgated system is a plain violation of Article II.

First, assuming *arguendo* that the contest statute even applies to presidential elections, the court below simply disregarded the plain language of that statute.[9]

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[9] The § 102.168 remedy by its terms does not extend to presidential elections, and it certainly does not authorize a contest action by a candidate for President (rather than by an unsuccessful candidate for presidential elector). Florida law instead establishes separate procedures for certifying the election of presidential electors and for replacing electors when appropriate, but makes no provision for a "contest" of the presidential election. *See* Fla. Stat. §§ 103.011, 103.021(5). The court's arbitrary extension of § 102.168 to a

As is clear from the face of the contest statute, what is "contested" is "the *certification*." Fla. Stat. § 102.168(1) (emphasis added). The deadline for filing a contest action runs from "the date the last county canvassing board . . . certifies the results of the election being contested," *id.* at § 102.168(2); in any such action "the proper party defendant" "shall be" the canvassing board. *Id.* at 102.168(4). It would be hard to find language that more clearly indicates the legislature's intent to provide for judicial *review* of the certification decision, as opposed to a *de novo* examination of each purportedly disputed ballot without regard to the certified judgment of the body whose statutory duty is to count the votes. Not surprisingly, until the decision below, Florida law had long recognized that there is a "presumption that returns certified by election officials are presumed to be correct." *Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1975). Specifically, certified election returns are "regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld." *Id.* at 268-69 n.5 (quotation omitted). Indeed, to overcome that strong presumption, an election challenger must show, as a threshold matter, that there has been "substantial noncompliance with the election statutes." *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998).

By contrast, the decision below treats a contest as a *de novo* proceeding in which courts may treat the judgments of the canvassing boards and of the Secretary of State—including certification—as purely hortatory pro-

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presidential "contest" is therefore itself a violation of Article II.

nouncements.[10] Those judgments thus become legally meaningless, since the circuit court *must* adjudicate the dispute without regard to any reasons, however compelling, that the canvassing boards or the executive may have had for certifying results as they did. Plaintiffs in the position of the Gore respondents thus need not "contest" the "*certification*," for the court will—indeed must—simply *ignore* it. In fact, under the ruling below, *certified* election returns are treated with *less* dignity than returns that have not been certified by either the county canvassing boards or the state election commission. While the *certified* election results from *all* other counties (except Broward and Volusia, where manual recounts produced over 700 additional Gore votes) are presumed *incorrect* and will be subject to *de novo* judicial review, the decision below requires that the *uncertified* results of manual recounts in Palm Beach County (adding 176 or 215 Gore votes) and Miami-Dade County (with 168 additional Gore votes based solely on partial results) be certified without *any* judicial review of their correctness (or any review of whether the certified results from these counties, in fact, "rejected legal votes").

The consequence of the court's ruling is nothing less than the evisceration of the internal coherence of the legislature's design. The legislature provided for canvassing boards, not courts, to count votes. Indeed, even the

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[10] The court attempted to justify its decision to ignore the certification, and its imposition of "de novo" review, with the observation that, because "a protest is not a prerequisite for a contest," "[n]o appellate relationship exists between a 'protest' and a 'contest.'" Pet. App. 12a-13a. Certification, however, quite clearly *is* a prerequisite for a contest, and the statute provides no basis for ignoring certification merely because no "protest" need ever have been lodged before the election results were certified.

statute from which the court below claimed to derive its purportedly uniform "intent of the voter" standard—a statute that by its plain terms applies only to the initial canvass of votes when a ballot is *spoiled* or *damaged*, *see* Fla. Stat. § 101.5614(5)—expressly provides that whether a ballot reflects a "clear indication of the intent of the voter" is a determination to be made "*by the canvassing board.*" *Id.* (emphasis added). *See also* Fla. Stat. § 102.166(7)(b) ("If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented *to the county canvassing board* for it to determine the voter's intent.") (emphasis added). By revoking the canvassing board's legislatively conferred authority and ordering the *circuit court* to "commence the tabulation of the Miami-Dade ballots" and conduct its own *de novo* examination of which ballots are valid, Pet. App. 34a, the court below overrode the will of the legislature to repose responsibility for examining ballots in election officials with presumed expertise in this field (subject to the ultimate interpretive authority of the Secretary of State), and thereby violated Article II, § 1. *See* Pet. App. 45a (Wells, C.J., dissenting) ("Directing the trial court to conduct a manual recount of the ballots violates article II, section 1, clause 2 of the United States Constitution, in that neither this Court nor the circuit court has the authority to create the standards by which it will count the under-voted ballots").

Moreover, the legislature clearly anticipated that some elections might be close, and clearly provided rules on how to deal with that situation. In particular, the legislature has never prescribed manual recounts as the exclusive, or even preferred, methodology for discerning the intent of voters or for distinguishing "legal" from "illegal" votes. Instead, when an initial count of the election results demonstrates that the margin of victory for a candidate is less than one-half of one percent, an *automatic* recount must take place, unless the losing candidate does not desire such a recount. *See* Fla. Stat. § 102.141(4). A manual recount *may* be ordered at the

protest stage, subject to detailed requirements—including the requirement that "all ballots" must be counted when such a recount is ordered. *See* Fla. Stat. § 102.166. Under the scheme devised by the court below, however, there literally is no point in the safeguards provided for such recounts at the protest stage. Indeed, there is no point in any candidate or canvassing board *ever* going through the protest process or in conducting a manual recount. To achieve the result reached by the court below, the legislature might as well have dispensed with the bulk of the election code and simply provided for the shipment of all ballots to the circuit court immediately following the certification of the election results. Indeed, if Florida law could plausibly be read in the manner announced by the court below, the court's own earlier efforts—merely two weeks ago—to extend the certification deadline so as to permit additional manual recounts are completely inexplicable.

The Florida Supreme Court also approved the inclusion in the statewide election results of ballots (such as those from Broward County) that were counted as valid votes on the basis of mere "dimples" or indentations on the ballot. The Florida legislature has *never* provided that dimpled ballots should be counted as valid votes. To the contrary, counting "dimpled" ballots as valid votes violates the very statute relied on by the court below, Fla. Stat. § 101.5614(5), which requires "a *clear indication* of the intent of the voter as determined by the canvassing board" (emphasis added). Although the election code contemplates a certain level of discretion in how canvassing boards may elect to count votes, it also provides expressly for the means for cabining that discretion and binding those boards to a *uniform* counting standard: The Secretary of State is the "chief election officer of the state" and her duty is to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Fla. Stat. § 97.012(1). The Florida Supreme Court's crazy-quilt ruling, by contrast, orders selective and partial recounts

conducted pursuant to varied and ever-shifting standards, thus expressly *mandating* a lack of consistency—in direct contravention of the legislature's unequivocal directive to achieve uniformity in the operation of Florida's election laws.[11]

Before the decision below, no statute in Florida had ever been interpreted as establishing the principle that "it is absolutely essential" to conduct a manual recount of all "undervotes" to determine whether a voter's intent can be divined from them. *Id.* at 15a. In every statewide election there are tens or hundreds of thousands of ballots that do not register votes and yet are not manually recounted. But if that recount principle were in fact an established fixture of Florida law, it would be hard to escape the conclusion that *all* ballots must be counted in the same manner in order to determine *each* voter's true "intent." For example, once the court believed, however erroneously, that the outcome of the election was "in doubt," it was irrational to require manually counting "undervotes" but not "overvotes"—the court's ruling would require courts to ignore the vote of anyone who clearly marked his ballot for a candidate and also wrote in the same candidate, resulting in his vote being disqualified as an "overvote" even though his intent is unmistakable. The legislative safeguards of § 102.166 (5)(c)—which provides that if a county canvassing board elects to conduct a manual recount, it "shall" "[m]anually recount *all* ballots" (emphasis added)—are plainly designed to avoid the dangers of selective, arbi-

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[11] Because the Florida legislature has empowered the canvassing boards to determine what constitutes a "clear indication" of voter intent, the decision below also substitutes judicially mandated standards for standards that the canvassing boards had issued pursuant to legislatively delegated authority. *See* Stay App., Exh. J (Palm Beach County Guidelines providing that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote").

trary and incomplete results inherent in a partial manual recount. Indeed, because the legislature imposed "'a mandatory obligation to recount all the ballots in the county'" *before* certification in those cases in which a manual recount is appropriate, Pet. App. 26a), it is inconceivable that the legislature intended a partial recount to suffice for *overturning* those certified results.[12]

It is no answer to say that § 102.166's requirement that a manual recount must include *all* ballots has no applicability in a contest action under § 102.168. As Chief Justice Wells recognized, "it is only in section 102.166 that there are any procedures for manual recounts which address the logistics of a recount," and thus the two sections must be read consistently with one another—particularly where, as here, there was an initial protest filed in a county pursuant to § 102.166 and a subsequent contest of that county's return pursuant to § 102.168. *See* Pet. App. 42a-43a (Wells, C.J., dissenting).

The decision below therefore ushers in a regime that cannot possibly be supported by any reasonable reading of the contest statute or any other provision of the Florida Election Code. The authority to count votes, entrusted by the Legislature to county officials subject to limited judicial review, has now been seized by the state judiciary, which *alone* now has authority to count votes and declare the election winner. A two-step process—administrative action followed by deferential judicial review—has been transformed by fiat into a unitary ju-

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[12] Under the new legislative scheme adopted by the court below, an unrepresentative 20 percent of the ballots in Miami-Dade County will have been manually recounted and included in the certified total, whereas the remaining 80 percent (with the exception of the purported "undervotes") will not have been manually recounted at all. (As discussed below, this also constitutes a patent violation of the Equal Protection Clause.)

dicial examination of the ballots—one in which the circuit court may simply commandeer any county resources it might need to conduct its own counts. Indeed, because those counts have been untethered from the minimal statutory moorings that the legislature prescribed for vote-counting—such as bipartisan membership in counting boards—subjective concepts of equity jurisprudence are the only safeguard on which petitioners could rely to expect a fair evaluation of the disputed ballots. Especially given that there is no objective statutory standard—or, even now, any judicially created standard—for determining which partially perforated or "dimpled" ballots evince clear voter intent and are therefore "legal votes," there is no basis for believing that that necessarily *ad hoc* process would produce a result more reliable than that produced by the certified election results.

B. Article II Precludes The Florida Supreme Court's Exercise Of Jurisdiction

The Supreme Court of Florida lacked jurisdiction, as a matter of federal law, to enter the judgment below. Under Florida law, assuming *arguendo* that the legislature has authorized contest actions in presidential elections, only the circuit court possessed legislatively conferred jurisdiction to resolve the Gore respondents' claims. *See* Fla. Stat. § 102.168(1) (permitting election certifications to be "contested in the circuit court"); *id.* § 102.168(8) (authorizing "[t]he circuit judge to whom the contest is presented" to resolve contests).[13]

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[13] Although petitioners' counsel responded to an oral argument inquiry in a manner expressing acceptance of that court's jurisdiction, petitioners promptly clarified their position in their post-argument brief in the court below. That brief noted that Article II confers sole authority on state legislatures to determine the manner of appointing electors, and that the legislature's authority "'cannot be taken from them

By contrast, the Florida Legislature granted *no* such jurisdiction to the Florida Supreme Court—a point seemingly recognized by the court below, which rationalized its authority to overturn the circuit court's judgment on the sole basis of the Florida Constitution. Pet. App. 1a (citing FLA. CONST. art. V, § 3(b)(5)); *see also Allen v. Butterworth*, 756 So. 2d 52, 63 (Fla. 2000) ("appellate jurisdiction of the courts of Florida is derived entirely from Article V of the Florida Constitution"). Article II, § 1 of the United States Constitution, however, does not permit state constitutions to circumscribe in any way a state legislature's selection of the manner of choosing presidential electors. *See McPherson*, 146 U.S. at 35 ("This power is conferred upon the legislatures of the states by the constitution of the United States, *and cannot be taken from them or modified by their state constitutions.*") (emphasis added) (quoting with approval Senate Rep., 1st Sess., 43d Cong., No. 395). Thus, because the Florida *Legislature* has conferred no role in reviewing contests over the results of a presidential election on the Florida Supreme Court, the

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or modified by their State constitutions . . . .'" Pet. App. 102a n.1 (citations omitted). As petitioners explained, "equitable relief cannot lie because . . . 'the original and appellate jurisdiction of the Courts of Florida is derived entirely from article V of the Florida Constitution, *not* [from] the Florida legislature.'" *Id.* at 104a-105a (citation omitted). For that reason, the court below had no substantial basis for asserting that all parties "agree[d]" to that court's jurisdiction. *Id.* at 1a n.1. Indeed, even if petitioners had agreed to—rather than expressly challenged—the court's jurisdiction, that would not provide an adequate state ground for the court's exercise of jurisdiction in this case, because under Florida law, "'the parties cannot stipulate to jurisdiction over the subject matter where none exists.'" *Polk County v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997) (quoting *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994)).

court below lacked authority to enter its judgment, and the judgment below must accordingly be reversed.

This Court confronted a similar question in *Leser v. Garnett*, 258 U.S. 130 (1922), where it rejected a claim that several state legislatures, owing to provisions in their respective state constitutions, lacked the power to ratify the Nineteenth Amendment. The Court held that the state constitutions did not limit the legislatures' constitutionally delegated power, explaining that "the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State." *Id.* at 137. *See also Hawke v. Smith*, 253 U.S. 221, 227 (1920) (rejecting state constitutional limits on legislature's ratification power and concluding "[i]t is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed"). The Florida legislature's Article II power thus transcends any limitations sought to be imposed by the Florida Constitution.

Contrary to the Gore respondents' assertion, the supreme court's reliance on the state constitution as a purported basis for jurisdiction cannot be justified on the grounds that the courts must "assume that the Legislature passed [the contest statute] with knowledge of the prior existing laws." Stay Opp. Br. 12 (citation omitted). That principle of interpretation was not invoked by the court below, and in any event cannot be tortured into the proposition that the contest *statute* incorporates "the ordinary accouterments of appellate review of circuit court decisions." *Id.* That canon of construction, whatever it may mean in other circumstances, cannot mean that the legislature can simply be deemed to have granted to the state supreme court authority to review contest proceedings in cases where Article II must be observed. Because the legislature's power in this area is

"exclusive[]," *McPherson*, 146 U.S. at 27, there is no reason to suspect the legislature intended its statutory scheme to be "supplemented" with appellate review provisions it chose *not* to include in the statute itself. It would amount to a significant erosion of Article II if that grant of plenary authority to state legislatures could be deemed to have been delegated *sub silentio*.

In sum, the court below plainly altered the "manner" of appointing electors. The court was constrained by Article I, § 2 to follow the statutory scheme established by the legislature, but failed to do so, choosing instead to substitute a scheme of its own devise. Such an unauthorized exercise of constitutionally delegated power cannot escape this Court's scrutiny through the simple expedient of labeling it routine "judicial review" of a contest proceeding.

C. The Florida Supreme Court's Decision Is Improperly Predicated On Its Now-Vacated Opinion Of November 21, Perpetuating Its Article II Errors

Although this Court vacated the Florida Supreme Court's November 21 decision in part based on reservations concerning that opinion's compliance with, and consideration of, Art. II, § 1, cl. 2 of the United States Constitution, *Bush*, slip op. at 7, the decision below expressly rests—without explanation—on that earlier flawed decision. Such reliance on a prior vacated decision defies this Court's mandate, and extends the error of the November 21 decision, which was expressly predicated on the erroneous assumption that state constitutional provisions override legislatively mandated procedures for appointing presidential electors. The court's December 8 opinion thus represents an *ongoing* violation of *McPherson* and its requirement that the legislature *alone* may define the method of appointing electors.

Most prominently, the court below mandated that additional votes reflected in Palm Beach County's un-

timely returns be added to Vice President Gore's certified totals explicitly on the sole ground that the November 21 opinion "held that all returns must be considered unless their filing would effectively prevent an election contest from being conducted or endanger the counting of Florida's electors in the presidential election." Pet. App. 29a-30a. Tellingly, the court below failed to explain how its vacated decision is still even binding let alone how it squares with this Court's December 4 vacatur and remand with instructions to consider and follow federal law. *Bush*, slip op. at 7. In relying on its prior vacated decision without justification and without reconsideration, the Florida Supreme Court has flouted the mandate of this Court.

For example, because the Florida Supreme Court's November 21 decision has been vacated, the Secretary's alternate certification of a 930-vote lead for Governor Bush should be in effect before any contest recounts begin, but that is clearly not contemplated by the court below. On several separate occasions, the court below explicitly articulates a much smaller margin between the candidates, and assumes votes counted by the county canvassing boards after the statutory deadline had passed as valid votes for Vice President Gore. Indeed, two of the "errors" committed by the circuit court were in failing to count as valid votes "(1) the 215 net votes for Gore identified by the Palm Beach County Canvassing Board and (2) in not including the 168 net votes for Gore identified in a partial recount by the Miami-Dade County Canvassing Board." Pet. App. 3a-4a. These votes could only *possibly* count if the court's November 21, 2000 holding were still binding.[14] Moreover, the

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[14] To be clear, the court below did not hold that the circuit court erred in merely failing to examine the Palm Beach and Miami-Dade County ballots and determine whether they were legal votes or not—such a judgment would not necessarily conflict with this Court's prior mandate—but in failing

court below also implicitly countenances the inclusion of the returns from Broward County's manual recount conducted after the Florida statutory deadline but before the judicially-created November 26 deadline. Pet. App. 30a.

II. The Florida Supreme Court's Decision Conflicts With 3 U.S.C. § 5

Congress has provided in 3 U.S.C. § 5 that "any controversy or contest concerning the appointment" of a State's electors should be resolved "pursuant to" "laws enacted *prior to*" election day. 3 U.S.C. § 5 (emphasis added). Two significant benefits follow from State compliance with the terms of § 5. First, "it creates a 'safe harbor' for a State insofar as congressional consideration of its electoral votes is concerned." *Bush*, slip op. at 6. This alone advances the "'pervasive national interest'" in presidential elections by providing certainty and finality. *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983) (quoting *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975)). It embodies the congressional judgment that rules applicable to election disputes cannot fairly be changed once the voters have gone to the polls. *See* 18

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to *automatically* include those votes as legal votes in the vote totals. Pet. App. 25a, 29a. Such conclusive deference is due a canvassing board determination—under the decision of the court below—only at the protest and not the contest stage of the proceeding. Pet. App. 13a. At the contest stage, the ballots—like the additional 9,000 Miami-Dade ballots—must be manually examined to discern voter intent, Pet. App. 32a, and any canvassing board determinations in this regard are mere "*evidence* that a ballot does or does not qualify as a legal vote." Pet. App. 28a (emphasis added). Thus, the Florida Supreme Court held that the Miami-Dade and Palm Beach County votes were properly counted at the protest stage of the recount process despite the fact that they were counted after the statutory deadline governing that process.

CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper) ("these contests should be decided under and by virtue of laws made prior to the exigency under which they arose"); *id.* ("How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?").

Section 5 thus creates a compact between States and Congress. By enacting laws prior to election day that seek to resolve potential controversies or contests concerning presidential electors, in accordance with its exclusive authority vested by Article II, the Florida Legislature sought to obtain for the State of Florida and its voters the protections that § 5 affords.

A second, and no-less-important, benefit of State compliance with the terms of § 5 is that it alleviates the need for Congress to intervene actively in a presidential election. Indeed, Congress enacted § 5 precisely to avoid a repetition of the near-cataclysmic result of its effort to resolve the presidential election of 1876. *See, e.g.*, 18 CONG. REC. 30 (Dec. 7, 1886) (remarks of Rep. Caldwell) (bill is intended to prevent repeat of "the year of disgrace, 1876"). Or, in the words respondents used in a prior brief to this Court: "Congress recognized that . . . it was essential to take 'this question out of the political cauldron.'" Gore Br., No. 00-836, at 24 n.14 (quoting 15 CONG. REC. 5079 (June 12, 1884) (remarks of Rep. Browne)). There is a strong federal interest in preventing questionable applications of state law that could force Congress to arbitrate divisive electoral disputes. The very purpose of § 5 was to avoid the chaos and confusion sown in the national polity by a protracted and unresolved dispute about the results of a presidential election—even in an individual State.

If this "principle of federal law" is complied with, *Bush*, slip op. at 6, the determination of an electoral dispute is entitled to "conclusive" effect and "shall govern

in the counting of the electoral votes," 3 U.S.C. § 5. As the language and history of the statute make clear, Congress has asserted its federal role in the context of presidential elections to "assure finality" to States' determinations of disputes as long as they comply with § 5's requirements. *Bush*, slip op. at 6.

Despite this Court's recent suggestion to the Florida Supreme Court that it is not free to disregard the Florida Legislature's decision to secure for the citizens of Florida the benefits of § 5,[15] and despite the Florida court's recognition that "because the selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, the Florida election law scheme must yield in the event of a conflict," Pet. App. 16a n.11, the court below has again ordered relief that fails to adhere to § 5's requirements—this time only four days before the December 12 deadline imposed by § 5. As Chief Justice Wells explained in his dissenting opinion:

> My succinct conclusion is that the majority's decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion.

Pet. App. 35a (Wells, C.J., dissenting). Reversal of the decision below is essential to preserve the protections that Congress sought to confer upon the States through § 5, to secure the certainty and finality of Florida's electoral process, and to ensure that Florida's electoral votes are accorded proper consideration in Congress.

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[15] In *Bush*, this Court cautioned that "a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of [state law] that Congress might deem to be a change in the law." *Bush*, slip op. at 6.

As discussed in Part I above, the Florida Supreme Court's decision announces a substantial, judicially mandated change in Florida law and thus fails to determine the election dispute "pursuant to" the laws enacted prior to November 7, 2000. The changes in Florida law announced in the court's decision are numerous.

First, and most fundamentally, the extraordinary remedy provided by the Florida Supreme Court has no statutory support. Nothing in the Florida Election Code provides for the procedure and results mandated by the Florida Supreme Court, and there is no indication that such a remedy was ever contemplated by the legislature.

Second, as noted more fully above, *see* Part I.A, *supra*, the Florida Supreme Court's novel exposition of the contest statute effectively renders superfluous the more specific provisions regarding recounts. *See, e.g.*, Fla. Stat. §§ 102.141(4), 102.166.[16]

Third, by ordering that the results of a partial recount in Miami-Dade County be included in the certified results, the court effectively rewrote the statutory provisions in Fla. Stat. §§ 102.166(4)(d) and 102.166(5)(c) that require that "all" ballots be counted in a manual recount.

Fourth, the court's decision flatly disregarded the Florida Election Code by authorizing courts, rather than county canvassing boards, to determine the validity of a ballot. *See* Fla. Stat. § 101.5614(5).

Fifth, the court departed from the statutory language providing county canvassing boards with discretion to determine whether to conduct manual recounts in the first place, Fla. Stat. §§ 102.166(4)(c) and (5)(a)-(c), and

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[16] The legislatively enacted statutory scheme must be read as a whole, which includes giving effect to the detailed provisions specifically governing recounts. *See* Pet. App. 39a, 42a-43a (Wells, C.J., dissenting).

instead directly ordered that manual recounts be conducted.

Sixth, the Florida Supreme Court created a new standard for determining whether a ballot should be deemed a legal vote, and included "dimpled" ballots as valid votes. Prior to the court's decision there was no such standard in Florida.[17]

Seventh, the court established a new multi-tiered standard of review in which some ballots will be reviewed by the trial court under a *de novo* standard and others will not be reviewed at all.

Eighth, the court's decision ordered that votes from Palm Beach and Miami-Dade Counties that were not submitted before either the seven-day statutory deadline (Fla. Stat. §§ 102.111 and 102.112) or the judicially fashioned November 26 deadline, must nevertheless be included in the statewide certification. The court's determination to include these votes in the final tally constitutes a further change in the law.

Finally, the Palm Beach County Canvassing Board's decision to count "dimpled" or indented chads as votes was a plain deviation from the County's prior, established written policy. The Palm Beach County guidelines on counting ballots, issued in November 1990, make clear that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote . . .

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[17] The judgment below is also at odds with the previous policy that the counties undertook manual recounts only because of evidence of machine error and not solely because of the alleged failure of certain voters to fully punch through their ballot cards. During oral argument before this Court in *Bush*, the Florida Attorney General's office *could not name a single instance, prior to this year's presidential election, in which manual recounts were undertaken for mere voter error*. *See* No. 00-836, Or. Arg. Trans. 39-40 (Dec. 1, 2000).

an indentation is not evidence of intent to cast a valid vote." *See* Exh. J attached to Applic. for Stay, No. 00-A504; *see also* Trial Tr. 238-39 (testimony discussing 1990 standards).[18] Despite that previously announced standard, the Board changed its approach after the November 7 election and decided to count some ballots that would not have complied with its prior policy.[19] This change in policy by the organ of government granted the authority to conduct manual recounts fails to satisfy 3 U.S.C. § 5's express requirement that controversies be resolved pursuant to law as it exists prior to election day. By giving effect to that change in policy, the decision below compounds the noncompliance.

In each of these ways, the Florida Supreme Court's decision conflicts with § 5's requirements.[20] By an-

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[18] That standard of what constitutes a vote was clearly reflected in the instructions given to Palm Beach voters on election day, which stated: "After voting, check your ballot card to be sure your voting sections are clearly and cleanly punched and there are no chips left hanging on the back of the card." *Touchston v. McDermott*, No. 00-15985, 2000 WL 1781942, at *6 n.19 (11th Cir. Dec. 6, 2000) (Tjoflat, J., dissenting).

[19] The Board's decision was triggered by a judicial ruling (itself a change in the law) that the Board could not have a per se rule against counting such ballots. *See Florida Democratic Party v. Palm Beach County Canvassing Bd.*, No. CL00-11078-AB, Trial Tr. 244-47 (Fla. 15th Jud. Cir. Nov. 15, 2000).

[20] Although the Florida court's decision purports to apply state law, the court was clearly cognizant of 3 U.S.C. § 5; yet its decision ultimately misinterprets that federal law and fails to heed this Court's admonition to avoid construing the Florida statute in this context to create newly announced changes in law. When the resolution of a federal question turns on whether state law has changed or a state court has adopted a

nouncing new, post-election changes in the law, the Florida Supreme Court's decision ensures that any change in the certified election results will not be "conclusive" under § 5. The decision thus lacks binding effect on the parties and on the state election officials it seeks to command, and it places Florida's 25 electors at risk, thereby frustrating the Florida Legislature's choices in establishing a statutory scheme consistent with 3 U.S.C. § 5.[21] These actions also frustrate one of the ob-

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new rule of law in violation of federal constitutional norms, this Court will examine the state court's decision. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 353-55 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958) (This Court's "jurisdiction is not defeated if the non-federal ground relied on by the state court is without any fair or substantial support"; "in order that constitutional guaranties may appropriately be enforced, [this Court must ascertain] whether the asserted non-federal ground independently and adequately supports the judgment." (internal quotations and citations omitted)); *Lindsey v. Washington*, 301 U.S. 397, 400 (1937) ("[W]hether the [state-law] standards of punishment set up before and after the commission of an offense differ, and whether the later standard is more onerous than the earlier within the meaning of the constitutional prohibition, are federal questions which this Court will determine for itself." (citation omitted)); *see also Michigan v. Long*, 463 U.S. 1032, 1039 n.4 (1983) ("[W]here the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."); *Terre Haute and Indianapolis R.R. Co. v. Indiana ex rel. Ketcham*, 194 U.S. 579, 589 (1904) (to decline jurisdiction because state court relied on "untenable construction" of unconstitutional state law "would open an easy method of avoiding the jurisdiction of this Court").

[21] The court below acknowledged that "[t]he need for prompt resolution and finality is especially critical in presi-

vious objectives of both Article II and Title 3—confidence in presidential election results, which follows from assurances that elections are determined under rules in effect when the votes are cast. This Court's reversal of the Florida Supreme Court's decision is necessary to preserve these fundamental attributes of the federal and state compact embodied in § 5, a compact entered into by the Florida Legislature pursuant to its exclusive constitutional power to determine the manner of appointing Florida's electors.

III. The Florida Supreme Court's Decision Violates Equal Protection And Due Process Guarantees

The Florida Supreme Court's decision is a recipe for electoral chaos. The court below has not only condoned a regime of arbitrary, selective and standardless manual recounts, but it has created a new series of unequal after-the-fact standards. This unfair, new process cannot be squared with the Constitution.

A. Equal Protection

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote . . . ." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). "The con-

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dential elections where there is an outside deadline established by federal law," Pet. App. 31a, but conceded that, in light of its decision, "practical difficulties may well end up controlling the outcome of the election," *id.* at 32a n.21. The court made no effort to explain how the arbitrary and haphazard recount process it had invented could properly be conducted within the time limits established by federal law. Nor did it offer any justification for its decision to effectively override the legislature's decision to secure the benefits of § 5 for the State of Florida. Justice Harding explained the reality of the situation in his dissent by noting that the majority's remedy "is impossible to achieve and . . . will ultimately lead to chaos." *Id.* at 56a.

ception of political equality ... can mean only one thing—one person, one vote ...."—"[t]he idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." *Id.* at 558 (internal citations omitted).

The Equal Protection Clause prohibits government officials from implementing an electoral system that gives the votes of similarly situated voters different effect based on the happenstance of the county or district in which those voters live. *See, e.g., Roman v. Sincock*, 377 U.S. 695, 707-12 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653 (1964) (state apportionment scheme "cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside").

The new electoral system created by the Florida Supreme Court is not facially neutral, but even if it were, the disparate treatment of voters based on the counties or geographic regions in which they live would nonetheless violate the Constitution. In *O'Brien v. Skinner*, 414 U.S. 524 (1974), for example, this Court held unconstitutional the New York absentee ballot statute because it made no provision for persons who were unable to vote while they were incarcerated in their county of residence. Under the New York statute, "if [a] citizen is confined in the county of his legal residence he cannot vote by absentee ballot as can his cellmate whose residence is in the adjoining county." *Id.* at 529. As a result, the Court held, "New York's election statutes ... discriminate between categories of qualified voters in a way that ... is wholly arbitrary." *Id.* at 530. The Court therefore concluded that "the New York statutes deny appellants the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* at 531.

Respondents attempts to distinguish *O'Brien*, arguing that it "stands only for the unremarkable proposition

that voters cannot be denied the right to vote solely because of their county of residence," and Florida voters, unlike the inmates in *O'Brien*, have not been "denied the right to vote altogether" on that basis. Stay Opp. at 19-20. That argument, however, ignores settled equal protection precedent, and does a significant disservice to the fundamental right to vote. As this Court has long recognized, the right to vote is "denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555.[22]

As in *O'Brien* and *Reynolds*, the necessarily disparate manual recounts ordered by the Florida Supreme Court arbitrarily treat voters differently based solely on where they happen to reside. For example, where there is a partial punch or stray mark on a ballot, that ballot may be counted as a "vote" in some counties but not others. The court's order also requires that ballots counted as part of the contest proceedings are evaluated under a different standard than ballots in other counties that have already completed manual recounts. Indeed, the "standards" used in those earlier manual recounts themselves constituted equal protection violations, since, to the extent "standards" existed at all, they varied widely from county to county, and even changed from day to day or hour to hour within a single Florida county. *See* 00-837, Pet. at 5, 11-13.

Respondents nonetheless assert that the Florida Supreme Court's so-called "standard" based on the "clear

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[22] Respondents are also mistaken in suggesting that there can be no unconstitutional vote dilution when *additional* "votes" are counted. Stay Opp. at 20-21. As the Eleventh Circuit explained in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), if some ballots are counted improperly, other citizens' votes will be unconstitutionally diluted, even though the total number of votes may increase. *Id.* at 581.

indication of the intent of the voter" represents "a uniform, statewide standard" for conducting manual recounts. Stay Opp. at 19, 22. Indeed, respondents even goes so far as to call that infinitely elastic phrase "a clear standard—one that has been in place in Florida . . . for years," and one that "[t]he Florida canvassing boards and courts have long implemented." *Id.* at 22-23. Respondents' present characterization is strikingly different from reality and the position respondents took before the state courts. The Gore respondents conceded to the Florida Supreme Court in the earlier case involving the certification deadline that "different canvassing boards have used different standards." Gore Answer Br., Nos. SC 00-2346, -2348 and -2349, at vi <http://news.findlaw.com/cnn/docs/election2000/fsc11-19gorerply.pdf>.

In addition, the decision below manifestly violates equal protection by mandating the inclusion of 168 votes based on a manual recount of 20 percent of the ballots in Miami-Dade County (from predominantly Democratic precincts), while ordering that only approximately 9,000 of the remaining 80 percent of the ballots be recounted —even though many of those ballots were cast by voters in predominantly Hispanic (and Republican-leaning) precincts. This patent violation is compounded by the fact that the judgment below disenfranchises numerous voters in Miami-Dade County and elsewhere whose ballots were rejected by the machine count as so-called "over-votes" but might upon manual inspection reflect a clear intent to vote for a particular candidate. *See* Pet. App. at 38a-39a n.26 (Wells, C.J., dissenting) (emphasizing disparate treatment of over-votes).[23]

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[23] This disparate treatment of predominantly Hispanic communities in Miami-Dade County also violates § 2 of the Voting Rights Act. *See* Bush Amended Br., No. SC00-2431, at 35 (Dec. 6, 2000). This Court has recognized that facially neutral changes in governmental structure that effectively discriminate against protected classes violate the Equal Pro-

The manual recount in Miami-Dade and the rest of the counties in Florida presents yet another intractable equal protection problem. The undisputed evidence at trial established that the very process of segregating undervotes from the rest of the ballots inevitably will identify as undervotes ballots that were *already counted* in the first (or second) machine counts, but not in the third pass through the machine. Trial Tr. 549 (34 precincts in Miami-Dade had more undervotes after segregating undervotes than were reported after the first recount). Votes that have already been included in the count may be counted *again*, after examination, as undervotes. Such double-counting of votes is a plain dilution of the votes of the remaining voters in violation of the equal protection clause. That equal protection violation with respect to Miami-Dade has already occurred, and would be exacerbated if more ballots were counted. Moreover, the decision below orders the rest of the counties in Florida to engage in the same sort of selective manual recount. Some "undervotes" would be segregated in that process that have already been included in the certified count, with the result that some votes would be counted and included twice.

By requiring further inconsistent and standardless recounts, the court's order guarantees disparate treatment for similarly situated voters. The equal protection violations are compounded by the fact that the court adopted a standard of "selective deference" to the decisions of the county canvassing boards. This conscious discrimination among voters on the basis of their county, or even precinct, of residence, violates the fundamental principle of equal protection that voters cannot be sub-

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tection Clause, *see, e.g.*, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967), and no less is true for changes in government operations that dilute the fundamental right to vote.

jected to disparate treatment "merely because of where they reside[ ]." *Reynolds*, 377 U.S. at 557; *see id.* at 566 ("Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.") (citations omitted).[24]

B. Due Process

The Florida Supreme Court's radical departure from preexisting Florida law, and its failure to provide and apply clear and consistent guidelines to govern the manual recounts, also violates the Due Process Clause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). The facts here present "'an officially-sponsored election procedure which, in its basic aspect, [is] flawed.'" *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. 1981) (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077-78 (1st Cir. 1978)), *cert. dismissed*, 459 U.S. 1012 (1982).

As explained above, the Florida Supreme Court has deviated substantially from the election law and practices in place prior to election day by ordering that the manual recount occur under circumstances and standards that have never before existed in Florida law, including fundamentally changing the meaning and legal consequences of certification of election results. *See*

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[24] Respondents incorrectly assert that the one-person-one-vote rule of the Fourteenth Amendment has no application to "at-large" elections based on a "statewide vote." Stay Opp. at 21. A voting scheme that places more weight on votes from a particular county, particularly where that county is dominated by one political party, violates equal protection principles regardless of whether the election involves a "statewide" vote. *Roe*, 43 F.3d at 577, 581 (invalidating state ballot scheme in statewide elections).

Part I, *supra*. The court has therefore changed the rules yet again, and as a result, the contest is being determined by "rules" that were not in place when the votes were cast—in plain violation of the Due Process Clause. *See Logan*, 455 U.S. at 432; *Duncan*, 657 F.2d at 703; *Griffin*, 570 F.2d at 1077-79; *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970).

In *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), for example, the court of appeals held that the State of Alabama violated a group of absentee voters' First and Fourteenth Amendment rights when it departed from the State's longstanding policy of not counting unwitnessed absentee ballots. The court stated that such a post-election change in the way absentee ballots are counted violates fundamental fairness because it "would dilute the votes of those who met the requirements" and because "the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the [requirements]." *Id.* at 581. Here, as in *Roe*, ballots that would not have been counted as lawful votes on election day will necessarily have their legal status changed as a direct consequence of selective, subjective, standardless, and shifting methods of manual recounting.

It cannot be seriously argued that there have not been post-election changes to the "standards" used to count votes. Since 1990, for example, Palm Beach County has had a policy against counting mere indented or "dimpled" chad as valid votes. The Chairman of the Palm Beach County Canvassing Board testified that upon commencing the sample recount, the Board used these established standards declaring that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote." Trial Tr. at 239; *see also* Exh. J., Applic. For Stay, No. 00A504 (1990 policy declaring that a mere indentation "is not evidence of intent to cast a valid vote"). That understanding of what constitutes a legal vote was clearly reflected in the instructions given

to voters on election day. *See* n.18, *supra*. The county canvassing board, however, changed that policy post-election after litigation brought by Vice President Gore and his allies to require a more discretionary standard. *See* Don van Natta Jr. with David Barstow, *Elections Officials Focus of Lobbying From Both Camps*, N.Y. TIMES, Nov. 18, 2000, at A1. The "standards" used by other manual recount counties have undergone similar changes, Trial Tr. at 245-46, 497, 499 (Miami-Dade Supervisor would not count nonconforming ballot unless "there was a hanging chad by two points" during the sample recount, but then examined light penetration for the full recount). The decision below only magnifies the due process problem by replicating such changes, on a selective and unfair basis, throughout the State. Those changes alone constitute a clear constitutional violation.[25]

Respondents attempt to distinguish the due process cases upon which petitioners rely on the ground that the voter plaintiffs in cases such as *Roe* and *Briscoe* relied to their detriment on the preexisting election laws in determining how to cast their ballots, whereas in this case, no voter could have relied upon the standards by which voter intent is determined in voting. Stay Opp. at 22. Respondents are mistaken. Just as in *Roe*, Florida voters in, for example, Palm Beach County relied upon the definition of a legally valid vote reflected in the voter instructions they were given. Pursuant to those standards, voters who made some minor mark on their ballot but ultimately determined not to vote for any presiden-

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[25] Respondents' reliance (Stay Opp. at 21) on *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998), is misplaced. That case did not involve the fundamental right to vote. Moreover, the unstructured and chaotic procedures mandated by the Florida Supreme Court are "arbitrary and irrational," and therefore would plainly fail the due process standard articulated in that case. *Id.* at 548 (Kennedy, J., concurring).

tial candidate had no notice whatsoever that that minor mark could later be counted as a vote. If they had received such notice, they could have examined their ballots after voting, determined that some minor mark appeared on the ballot, and requested a new one or otherwise corrected the stray mark. *See* Trial Tr. at 456 (voter who may have dimpled his ballot by "plac[ing the stylus] over the name of one of the candidates," before deciding he did not want to cast a vote for President).

Moreover, the candidates were also forced to make decisions regarding, *inter alia*, whether or not to seek manual recounts in certain counties (or how to respond to such recounts requested by their opponents). These decisions, like the decision of the voters described above, turned in part on the candidates' assessment of the kinds of standards and processes in place prior to the election, including the procedures that had been used in prior recounts. Thus, respondents' assertion that no one could have meaningfully relied upon the standards for determining voter intent in place on election day is simply mistaken.

In addition, if the State of Florida wishes to implement a manual recount procedure, it must ensure that meaningful guidelines are established for determining whether and how to conduct such a recount, rather than leaving such crucial decisions to the unbridled discretion and arbitrary decision-making of local election officials and as-yet unspecified other individuals who may have a keen personal interest in the outcome of an election. The court's failure to provide such guidelines constitutes a clear violation of the Due Process Clause.

With humans making subjective determinations about an absent voter's intent, without standards established by law, there is a very substantial risk that the method for determining how to count a vote will be influenced, consciously or unconsciously, by individual desire for a particular result. That risk is heightened significantly here because of the irreversible damage

done to the ballots during the recount processes and the clear errors that have occurred during the manual recounts.[26] Further manual recounts, by another varying and inconsistent set of arbitrary "standards," will not be accurate. They will simply compound the unfair and standardless methods that have been the hallmark of the Florida recount. As Chief Justice Wells warned in his dissenting opinion below: "The majority returns the case to the circuit court for this partial recount of undervotes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown. That is but a first glance at the imponderable problems the majority creates." Pet. App. 35a.

Finally, the chaotic and unfair procedures mandated by the Florida Supreme Court effectively deny the parties any meaningful opportunity to raise objections to ballot determinations made by nonjudicial counters during the manual recount, and preclude any chance for judicial review of those determinations. Under the decision below, the trial court delegates its judicial role under Fla. Stat. § 102.168 to various county officials and other counters, and the trial court lacks the opportunity to review the ballots itself to form its own understanding of a particular voter's intent. Such sweeping denial of the opportunity to raise objections and obtain meaningful judicial review plainly violates the Due Process Clause. *See, e.g., Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930).

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[26] For example, during the manual recount process, ballots were treated roughly and dropped, causing serious and material damage to the ballots, including dislodging and removing "chads" from ballots. Trial Tr. at 484-85, 505-06. This type of degradation obviously limits the accuracy of each succeeding recount. *See* also 00-837, Pet. at 10-11.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted.

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No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
Petitioners,

v.

ALBERT GORE, JR., *et al.*,
Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

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APPENDIX A

Supreme Court of Florida

No. SC00-2431

ALBERT GORE, JR., and JOSEPH I. LIEBERMAN,

Appellants,

vs.

KATHERINE HARRIS, as Secretary, etc., et al.,

Appellees.

[Dec. 8, 2000]

PER CURIAM.

We have for review a final judgment of a Leon County trial court certified by the First District Court of Appeal as being of great public importance and requiring immediate resolution by this Court. We have jurisdiction. *See* art. V, § 3(b)(5), Fla. Const.[1] The final judgment under review denies all relief requested by appellants Albert Gore, Jr. and Joseph I. Lieberman, the Democratic candidates for President and Vice President of the United States, in their complaint contesting the certification of the state results in the November 7, 2000, presidential election.[2] Although we find that the appellants are entitled to reversal in part of the trial court's

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[1]The parties have agreed that this appeal is properly before this Court.

[2]The appellants have alternatively styled their request for relief as a Petition for Writ of Mandamus or Other Writs.

order and are entitled to a manual count of the Miami-Dade County undervote, we agree with the appellees that the ultimate relief would require a counting of the legal votes contained within the undervotes in all counties where the undervote has not been subjected to a manual tabulation. Accordingly, we reverse and remand for proceedings consistent with this opinion.

I. BACKGROUND

On November 26, 2000, the Florida Election Canvassing Commission (Canvassing Commission) certified the results of the election and declared Governor George W. Bush and Richard Cheney, the Republican candidates for President and Vice President, the winner of Florida's electoral votes.[3] The November 26, 2000, certified results showed a 537-vote margin in favor of Bush.[4]

On November 27, pursuant to the legislatively enacted "contest" provisions, Gore filed a complaint in Leon County Circuit Court contesting the certification on the grounds that the results certified by the Canvassing Commission included "a number of illegal votes" and failed to include "a number of legal votes sufficient to change or place in doubt the result of the election."[5]

Pursuant to the legislative scheme providing for an "immediate hearing" in a contest action, the trial court held a two-day evidentiary hearing on December 2 and 3, 2000, and on December 4, 2000, made an oral statement in open court denying all relief and entered a final judgment adopting the oral statement. The trial court did not make any findings as to the factual allegations made in the complaint and did not reference any of the

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[3]*See* §§102.111 & .121, Florida Statutes (2000).

[4]Bush received 2,912,790 votes while Gore received 2,912,253 votes.

[5]*See* § 102.168(3)(c), Fla. Stat. (2000).

testimony adduced in the two-day evidentiary hearing, other than to summarily state that the plaintiffs failed to meet their burden of proof. Gore appealed to the First District Court of Appeal, which certified the judgment to this Court.

The appellants' election contest is based on five instances where the official results certified involved either the rejection of a number of legal votes or the receipt of a number of illegal votes. These five instances, as summarized by the appellants' brief, are as follows:

> (1) The rejection of 215 net votes for Gore identified in a manual count by the Palm Beach Canvassing Board as reflecting the clear intent of the voters;
>
> (2) The rejection of 168 net votes for Gore, identified in the partial recount by the Miami-Dade County Canvassing Board.
>
> (3) The receipt and certification after Thanksgiving of the election night returns from Nassau County, instead of the statutorily mandated machine recount tabulation, in violation of section 102.14, Florida Statutes, resulting in an additional 51 net votes for Bush.
>
> (4) The rejection of an additional 3300 votes in Palm Beach County, most of which Democrat observers identified as votes for Gore but which were not included in the Canvassing Board's certified results; and
>
> (5) The refusal to review approximately 9000 Miami-Dade ballots, which the counting machine registered as non-votes and which have never been manually reviewed.

For the reasons stated in this opinion, we find that the trial court erred as a matter of law in not including (1) the 215 net votes for Gore identified by the Palm

Beach County Canvassing Board[6] and (2) in not including the 168 net votes for Gore identified in a partial recount by the Miami-Dade County Canvassing Board. However, we find no error in the trial court's findings, which are mixed questions of law and fact, concerning (3) the Nassau County Canvassing Board and the (4) additional 3300 votes in Palm Beach County that the Canvassing Board did not find to be legal votes. Lastly, we find the trial court erred as a matter of law in (5) refusing to examine the approximately 9000 additional Miami-Dade ballots placed in evidence, which have never been examined manually.

II. APPLICABLE LAW

Article II, section I, clause 2 of the United States Constitution, grants the authority to select presidential electors "in such Manner as the Legislature thereof may direct." The Legislature of this State has placed the decision for election of President of the United States, as well as every other elected office, in the citizens of this State through a statutory scheme. These statutes established by the Legislature govern our decision today. We consider these statutes cognizant of the federal grant of authority derived from the United States Constitution and derived from 3 U.S.C. § 5 (1994) entitled "Determination of controversy as to appointment of electors." That section provides:

> If any State shall have provided, *by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures*, and such determination shall have been made at

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[6]Bush claims in his brief that the audited total is 176 votes. We make no determination as to which of these two numbers are accurate but direct the trial court to make this determination on remand.

> least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

(Emphasis supplied).

This case today is controlled by the language set forth by the Legislature in section 102.168, Florida Statutes (2000). Indeed, an important part of the statutory election scheme is the State's provision for a contest process, section 102.168, which laws were enacted by the Legislature prior to the 2000 election.[7] Although

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[7]In a substantial and dramatic change of position after oral argument in this case, Bush contends in his "Motion for Leave To File Clarification of Argument" that section 102.168 cannot apply in the context of a presidential election. However, this position is in stark contrast to his position both in this case and in the prior appeal. In fact, in Oral Argument on December 7, 2000, counsel for Bush agreed that the contest provisions contained in the Florida Election Code have placed such proceedings within the arena for judicial determination, which includes the established procedures for appellate review of circuit court determinations. Further, Bush's counsel, Michael Carvin, in the prior Oral Argument in *Palm Beach Canvassing Board v. Harris*, in arguing against allowing manual recounts to continue in the protest phase, stated that he did not

> think there would be any problem in producing...*that kind of evidence in an election contest procedure*...instead of having every court in Florida resolving on an ad hoc basis the kinds of ballots that are valid and not valid, you would be centralizing the factual inquiry in one court in Leon County. So you would bring some orderliness to the process, and they would be able to resolve that evidentiary

courts are, and should be, reluctant to interject themselves in essentially political controversies, the Legisla-

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> question. One way or another, a court's going to have resolve it.

(emphasis supplied). Moreover, the Answer Brief of Bush in Case Nos. SC00-2346, 2348, and 2849 (Nov. 18, 2000 a page 18 states that "to implement Petitioners' desired policy of manual recounts at all costs, the Court is asked to . . . (5) substitute the certification process of Section 102.111 and Section 102.112 *for the contested election process of Section 102.168 as the means for determining the accuracy of the vote tallies*." (emphasis supplied). In addition, the December 5, 2000 brief of *Amici curiae of the Florida House of Representatives and the Florida Senate*, in case nos. SC00-2346, SC00-2348 & SC00-2349 (Dec. 5, 2000) at 8 "The Secretary's opinion was also consistent with the fact that the statutory protests that can lead to manual recounts are county-specific complaints about a particular county's machines, whereas *a complaint about punchcards generally undercounting votes* really raises a statewide issue that *should be pursued, if at all, only in a statewide contest*." (emphasis supplied). Finally the Amended Answer Brief of the Secretary of State asserted that

> [p]etitioner has confused a pre-certification election protest (section 102.166) with a post-certification contest (section 102.168). such facts and circumstances are usually discovered and raised in a contest action that cannot begin until after the election is certified. The Legislature imposed a deadline for certification because of the short time frame within which to begin and conclude an election contest. Petitioners are, in effect, asking this Court to delay the commencement of election contest actions, if any, by improperly using the protest procedures to contest the election before certification. *Because the facts and circumstances concerning voter error and ballot design in Palm Beach County are more properly raised in a contest action, these facts were not relevant to the Secretary's decision to certify the election. Her decision triggered the time for bringing any election contest actions.* (emphasis supplied).

ture has directed in section 102.168 that an election contest shall be resolved in a judicial forum. *See* § 102.168 (providing that election contests not pertaining to either house of the Legislature may be contested "in the circuit court"). This Court has recognized that the purpose of the election contest statute is "to afford a simple and speedy means of contesting election to stated offices." *Farmer v. Carson*, 110 Fla. 245, 251, 148 So. 557, 559 (1933).

In carefully construing the contest statute, no single statutory provision will be construed in such a way as to render meaningless or absurd any other statutory provision. *See Amente v. Newman*, 653 So. 2d 1030, 1032 (Fla. 1995). In interpreting the various statutory components of the State's election process, then, a common-sense approach is required, so that the purpose of the statute is to give effect to the legislative directions ensuring that the right to vote will not be frustrated. *Cf. Firestone v. News-Press Pub. Co.*, 538 So. 2d 457, 460 (Fla. 1989) (approving common-sense implementation of valid portion of section 101.121, Florida Statutes (1985) -- which broadly read, in pertinent part, that "no person who is not in line to vote may come [into] any polling place from the opening to the closing of the polls, except the officially designated watchers, the inspectors, the clerks of election, and the supervisor of elections or his deputy" -- so as not to exclude persons accompanying aged or infirm voters, children of voting parents, doctors entering the building to treat voters needing emergency care, or persons bringing food or beverages to the election workers because such activities are recognized as "incidental to the voting process and . . . sometimes necessary to facilitate someone else's ability to vote").

Section 102.168(2) sets forth the procedures that must be followed in a contest proceeding, providing that the contestant file a complaint in the circuit court within ten days after certification of the election returns or five

days after certification following a protest pursuant to section 102.166(1), Florida Statutes (2000), whichever occurs later. Section 102.168(3) outlines the grounds for contesting an election, and includes: "Receipt of a number of illegal votes or *rejection of a number of legal votes sufficient to change or place in doubt the result of the election.*" § 102.168(3)(c) (emphasis added). Finally, section 102.168(8) authorizes the circuit court judge to "fashion such orders as he or she deems necessary to *ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under the circumstances.*" (Emphasis added.)

The Legislature substantially revised section 102.168 in 1999.[8] That amendment preserved existing rights of unsuccessful candidates and made important additional changes to strengthen the protections provided to unsuccessful candidates in a contest action to be determined.[9] Moreover, rather than restraining the ac-

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[8]Viewed historically, section 102.168 did not always provide for contests of the type we consider today. As originally enacted, section 102.168 simply provided a mechanism for ouster of elected local officials. Under that version of the statute, election challenges were limited to county offices, and only the person claiming to have been rightfully elected to the position could challenge the election. *See* Ch. 38, Art. 10, §§ 7, 8, 9 (1845).

[9]The following language of section 102.168, Florida Statutes was changed in 1999 (words stricken are deletions; words underlined are additions):

> (1) Except as provided in s. 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.
>
> (2) Such contestant shall file a complaint, together with the fees prescribed in chapter 28, with the clerk of the cir-

cuit court within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested or within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to s. 102.166(1), whichever occurs later. ~~adjourns, and~~

(3) The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election on a submitted referendum. The grounds for contesting an election under this section are:

(a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.

(b) Ineligibility of the successful candidate for the nomination or office in dispute.

(c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.

(e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board.

(4) The canvassing board or election board shall be the proper party defendant, and the successful candidate shall be an indispensable party to any action brought to contest the election or nomination of a candidate.

tions of the trial court hearing the contest, the legislative amendment codified the grounds for contesting an election, entitled any candidate or elector to an immediate hearing and provided the circuit judge with express authority to fashion such orders as are necessary to ensure that each allegation in the complaint is investigated, examined or checked. *See* Fla. H. R. Comm. on

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(5) A statement of the grounds of contest may not be rejected, nor the proceedings dismissed, by the court for any want of form if the grounds of contest provided in the statement are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.

(6) A copy of the complaint shall be served upon the defendant and any other person named therein in the same manner as in other civil cases under the laws of this state. Within 10 days after the complaint has been served, the defendant must file an answer admitting or denying the allegations on which the contestant relies or stating that the defendant has no knowledge or information concerning the allegations, which shall be deemed a denial of the allegations, and must state any other defenses, in law or fact, on which the defendant relies. If an answer is not filed within the time prescribed, the defendant may not be granted a hearing in court to assert any claim or objection that is required by this subsection to be stated in an answer.

(7) Any candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing. However, the court in its discretion may limit the time to be consumed in taking testimony, with a view therein to the circumstances of the matter and to the proximity of any succeeding primary or other election.

(8) The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

Ch. 99-339, § 3, Laws of Florida.

amined or checked. *See* Fla. H. R. Comm. on Election Reform, HB 291 (1999) Staff Analysis (February 3, 1999).

Although the right to contest an election is created by statute, it has been a long-standing right since 1845 when the first election contest statute was enacted. *See* ch. 38, art. 10, §§ 7-9 Laws of Fla. (1845). As well-established in this State by our contest statute, "[t]he right to a correct count of the ballots in an election is a substantial right which it is the privilege of every candidate for office to insist on, in every case where there has been a failure to make a *proper count*, call, tally, or return of the votes as required by law, and this fact has been duly established as the basis for granting such relief." *State ex rel. Millinor v. Smith*, 107 Fla. 134, 139, 144 So. 333, 335 (1932) (emphasis added). The Staff Analysis of the 1999 legislative amendment expressly endorses this important principle. Similarly, the Florida House of Representatives Committee on Election Reform 1997 Interim Project on Election Contests and Recounts expressly declared:

> Recounts are an integral part of the election process. For one's vote, when cast, to be translated into a true message, that vote must be accurately counted, and if necessary, recounted. The moment an individual's vote becomes subject to error in the vote tabulation process, the easier it is for that vote to be diluted.
>
> Furthermore, with voting statistics tracing a decline in voter turnout and in increase in public skepticism, every effort should be made to ensure the integrity of the electoral process.
>
> Integrity is particularly crucial at the tabulation stage because many elections occur in extremely competitive jurisdictions, where very close election results are always possible. In addition, voters and the media expect rapid and

> accurate tabulation of election returns, regardless of whether the election is close or one sided. Nonetheless, when large numbers of votes are to be counted, it can be expected that some error will occur in tabulation or in canvassing.

Id. at 15 (footnotes omitted). It is with the recognition of these legislative realities and abiding principles that we address whether the trial court made errors of law in rendering its decision.

III. ORDER ON REVIEW

Vice President Gore claims that the trial court erred in the following three ways: (1) The trial court held that an election contest proceeding was essentially an appellate proceeding where the County Canvassing Board's decision must be reviewed with an "abuse of discretion," rather than "de novo," standard of review; (2) The court held that in a contest proceeding in a statewide election a court must review all the ballots cast throughout the state, not just the contested ballots; (3) The court failed to apply the legal standard for relief expressly set forth in section 102.168(3)(c).

A. The Trial Court's Standard of Review

The Florida Election Code sets forth a two-pronged system for challenging vote returns and election procedures. The "protest" and "contest" provisions are distinct proceedings. A protest proceeding is filed with the County Canvassing Board and addresses the validity of the vote returns. The relief that may be granted includes a manual recount. The Canvassing Board is a neutral ministerial body. *See Morse v. Dade County Canvassing Board*, 456 So. 2d 1314 (Fla. 3d DCA 1984). A contest proceeding, on the other hand, is filed in circuit court and addresses the validity of the election itself. Relief that may be granted is varied and can be extensive. No appellate relationship exists between a "protest" and a "contest"; a protest is not a prerequisite for a

contest. *Cf. Flack v. Carter*, 392 So. 2d 37 (Fla. 1st DCA 1980) (holding that an election protest under section 102.166 was not a condition precedent to an election contest under section 102.168). Moreover, the trial court in the contest action does not sit as an appellate court over the decisions of the Canvassing Board. Accordingly, while the Board's actions concerning the elections process may constitute evidence in a contest proceeding, the Board's decisions are not to be accorded the highly deferential "abuse of discretion" standard of review during a contest proceeding.

In the present case, the trial court erroneously applied an appellate abuse of discretion standard to the Boards' decisions. The trial court's oral order reads in relevant part:

> The local boards have been given broad discretion which no Court may overrule, absent a clear abuse of discretion.

Gore v. Harris, No. 00-2808 (Fla. 2d Cir. Ct. Dec. 4, 2000) (Proceedings at 10). The trial court further noted: "The court further finds that the Dade Canvassing Board did not abuse its discretion. . . . The Palm Beach County Board did not abuse its discretion in its review and recounting process."[10] In applying the abuse of discretion standard of review to the Boards' actions, the trial court relinquished an improper degree of its own authority to the Boards. This was error.

B. <u>Must all the Ballots be Counted Statewide?</u>

Appellees contend that even if a count of the undervotes in Miami-Dade were appropriate, section 102.168, Florida Statutes (2000), requires a count of all votes in Miami-Dade County and the entire state as opposed to a selected number of votes challenged. However, the

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[10] *Gore v. Harris*, No. 00-2808 (Fla. 2d Cir. Ct. Dec. ___, 2000) (*Proceedings* at 10-11).

plain language of section 102.168 refutes Appellees' argument.

Section 102.168(2) sets forth the procedures that must be followed in a contest proceeding, providing that the contestant file a complaint in the circuit court within ten days after certification of the election returns or five days after certification following a protest pursuant to section 102.166(1), whichever occurs later. Section 102.168(3) outlines the grounds for contesting an election, and includes: "Receipt of a number of illegal votes or *rejection of a number of legal votes sufficient to change or place in doubt the result of the election.*" § 102.168(3)(c) (emphasis added). Finally, section 102.168(8) authorizes the circuit court judge to "fashion such orders as he . . . deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under the circumstances."

As explained above, section 102.168(3)(c) explicitly contemplates contests based upon a "rejection of a number of legal votes sufficient to change the outcome of an election." Logic dictates that to bring a challenge based upon the rejection of a specific number of legal votes under section 102.168(3)(c), the contestant must establish the "number of legal votes" which the county canvassing board failed to count. This number, therefore, under the plain language of the statute, is limited to the votes identified and challenged under section 102.168(3)(c), rather than the entire county. Moreover, counting uncontested votes in a contest would be irrelevant to a determination of whether certain uncounted votes constitute legal votes that have been rejected. On the other hand, a consideration of "legal votes" contained in the category of "undervotes" identified statewide may be properly considered as evidence in the contest proceedings and, more importantly, in fashioning any relief.

We do agree, however, that it is absolutely essential in this proceeding and to any final decision, that a manual recount be conducted for all legal votes in this State, not only in Miami-Dade County, but in all Florida counties where there was an undervote, and, hence a concern that not every citizen's vote was counted. This election should be determined by a careful examination of the votes of Florida's citizens and not by strategies extraneous to the voting process. This essential principle, that the outcome of elections be determined by the will of the voters, forms the foundation of the election code enacted by the Florida Legislature and has been consistently applied by this Court in resolving elections disputes.

We are dealing with the essence of the structure of our democratic society; with the interrelationship, within that framework, between the United States Constitution and the statutory scheme established pursuant to that authority by the Florida Legislature. Pursuant to the authority extended by the United States Constitution, in section 103.011, Florida Statutes (2000), the Legislature has expressly vested in the citizens of the State of Florida the right to select the electors for President and Vice President of the United States:

> Electors of President and Vice President, known as presidential electors, shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4. Votes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates. The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes.

Id. In so doing, the Legislature has placed the election of presidential electors squarely in the hands of Florida's voters under the general election laws of Florida.[11] Hence, the Legislature has expressly recognized the will of the people of Florida as the guiding principle for the selection of all elected officials in the State of Florida, whether they be county commissioners or presidential electors.

When an election contest is filed under section 102.168, Florida Statutes (2000), the contest statute charges trial courts to:

> fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is *investigated, examined, or checked*, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

Id. (emphasis added). Through this statute, the Legislature has granted trial courts broad authority to resolve election disputes and fashion appropriate relief. In turn, this Court, consistent with legislative policy, has pointed to the "will of the voters" as the primary guiding principle to be utilized by trial courts in resolving election contests:

> [T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and

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[11]In other words, the Legislature has prescribed a single election scheme for local, state and federal elections. The Legislature has not, beyond granting to Florida's voters the right to select presidential electors, indicated in any way that it intended that a different (and unstated) set of election rules should apply to the selection of presidential electors. Of course, because the selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, the Florida election law scheme must yield in the event of a conflict.

> it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly *the right to be heard.*

Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975) (emphasis added). For example, the Legislature has mandated that no vote shall be ignored "if there is a clear indication of the intent of the voter" on the ballot, unless it is "impossible to determine the elector's choice . . . ." § 101.5614(5)-(6) Fla. Stat. (2000). Section 102.166(7), Florida Statutes (2000), also provides that the focus of any manual examination of a ballot shall be to determine the voter's intent. The clear message from this legislative policy is that every citizen's vote be counted whenever possible, whether in an election for a local commissioner or an election for President of the United States.[12]

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[12]In the election contest at issue here, this Court can do no more than see that every citizen's vote be counted. But it can do no less. In a scenario somewhat analogous to that presented here, and in an election contest for a seat in the United States House of Representatives, the contesting candidate sought to *exclude* some 11,000 votes from being counted because the votes were not timely reported to the Secretary of State. *See State ex rel. Chappell v. Martinez*, 536 So. 2d 1007. This Court, in a unanimous opinion authored by Justice McDonald, refused to exclude the votes and held that the contesting candidate "has presented no compelling reason

The demonstrated problem of not counting legal votes inures to any county utilizing a counting system which results in undervotes and "no registered vote" ballots. In a countywide election, one would not simply examine such categories of ballots from a single precinct to insure the reliability and integrity of the countywide vote. Similarly, in this statewide election, review should not be limited to less than all counties whose tabulation has resulted in such categories of ballots. Relief would not be "appropriate under [the] circumstances" if it failed to address the "otherwise valid exercise of the right of a citizen to vote" of all those citizens of this State who, being similarly situated, have had their legal votes rejected. This is particularly important in a Presidential election, which implicates both State and uniquely important national interests. The contestant here satisfied the threshold requirement by demonstrating that, upon consideration of the thousands of undervote or "no registered vote" ballots presented, the number of legal votes therein were sufficient to at least place in doubt the result of the election. However, a final decision as to the result of the statewide election should only be determined upon consideration of the legal votes contained within the undervote or "no registered vote" ballots of all Florida counties, as well as the legal votes already tabulated.

C. The Plaintiff's Burden of Proof

It is immediately apparent, in reviewing the trial court's ruling here, that the trial court failed to apply the statutory standard and instead applied an improper standard in determining the contestant's burden under the contest statute. The trial court began its analysis by stating:

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for disenfranchising the 11,000 residents of Flagler County who cast their ballots on November 8." *Id.* at 1009.

> [I]t is well established and reflected in the opinion of Judge Joanos and Smith v. Tine[13] [sic], that in order to contest election results under Section 102.168 of the Florida Statutes, the Plaintiff must show that, but for the irregularity, or inaccuracy claimed, the result of the election would have been different, and he or she would have been the winner.
>
> It is not enough to show a reasonable possibility that election results could have been altered by such irregularities, or inaccuracies, rather, a reasonable probability that the results of the election would have been changed must be shown.
>
> In this case, there is no credible statistical evidence, and no other competent substantial evidence to establish by a preponderance of a reasonable probability that the results of the statewide election in the State of Florida would be different from the result which has been certified by the State Elections Canvassing Commission.

This analysis overlooks and fails to recognize the specific and material changes to the statute which the Legislature made in 1999 that control these proceedings. While the earlier version, like the current version, provided that a contestant shall file a complaint setting forth "the grounds on which the contestant intends to establish his or her right to such office or set aside the result of

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[13] *Smith v. Tynes*, 412 So. 2d 925 (Fla. 1st DCA 1982) (involving allegations of enumerated acts asserted to constitute fraud and misrepresentation to the electorate sufficient to produce a different result) (citing *Nelson v. Robinson*, 301 So. 2d 508 (Fla. 2d DCA 1974), *cert. denied*, 303 So. 2d 21 (Fla. 1974) (involving a post-election challenge to a form of ballot which listed the candidates for a single office in alphabetical order using the same color ink, but on different lines)).

the election," the prior version did not specifically enumerate the "grounds for contesting an election under this section." Those grounds, as contained in the 1999 statute, now explicitly include, in subsection (c), the "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change *or place in doubt* the result of the election." (Emphasis supplied.) Assuming that reasonableness is an implied component of such a doubt standard,[14] the determination of whether the plaintiff has met his or her burden of proof to establish that the result of an election is in doubt is a far different standard than the "reasonable probability" standard, which was applicable to contests under the old version of the statute, and erroneously applied and articulated as a "preponderance of a reasonable probability" standard by the trial court here. Where, as here, a person authorized to contest an election is required to demonstrate that there have been legal votes cast in the election that have not been counted (here characterized as "undervotes" or "no vote registered" ballots) and that available data[15] shows that, applying an analysis of the historical recovery rate of legal votes within those undervotes or "no vote registered" ballots, by extrapolation, a number of legal votes would be recovered from the entire pool of the subject ballots which, if cast for the unsuccessful candidate, would change or place in doubt the result of the election. Here, there has been an undisputed showing of the existence of some 9,000 "under votes" in an election contest decided by a margin measured in the hundreds. Thus, a threshold contest

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[14]*Cf. Standard Jury Instructions in Criminal Cases*, 697 So. 2d 84, 90 (Fla. 1997) (approving standard jury instruction regarding "reasonable doubt," which is "not a mere possible doubt, a speculative, imaginary or forced doubt," and which "may arise from the evidence, conflict in the evidence or the lack of evidence").

[15]In this case, the circuit court did not review the ballot presented as evidence.

showing that the result of an election has been placed in doubt, warranting a manual count of all undervotes or "no vote registered" ballots, has been made.

LEGAL VOTES

Having first identified the proper standard of review, we turn now to the allegations of the complaint filed in this election contest. To test the sufficiency of those allegations and the proof, it is essential to understand what, under Florida law, may constitute a "legal vote," and what constitutes rejection of such vote.

Section 101.5614(5), Florida Statutes (2000), provides that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." Section 101.5614(6) provides, conversely, that any vote in which the board cannot discern the intent of the voter must be discarded. Lastly, section 102.166(7)(b) provides that, "[i]f a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent." This legislative emphasis on discerning the voter's intent is mirrored in the case law of this State, and in that of other states.

This Court has repeatedly held, in accordance with the statutory law of this State, that so long as the voter's intent may be discerned from the ballot, the vote constitutes a "legal vote" that should be counted. *See McAlpin v. State ex rel. Avriett*, 155 Fla. 33, 19 So. 2d 420 (1944); *see also State ex rel. Peacock v. Latham*, 25 Fla. 69, 70, 169 So. 597, 598 (1936) (holding that the election contest statute "affords an efficient available remedy and legal procedure by which the circuit court can investigate and determine, not only the legality of the votes cast, but can correct any inaccuracies in the count of the ballots by having them brought into the court and examining the contents of the ballot boxes if properly preserved"). As the State has moved toward electronic

voting, nothing in this evolution has diminished the longstanding case law and statutory law that the intent of the voter is of paramount concern and should always be given effect if the intent can be determined. *Cf. Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975), *cert. denied*, 425 U.S. 967 (1976) (recognizing the overarching principle that, where voters do all that statutes require them to do, they should not be disfranchised solely because of failure of election officials to follow directory statutes).

Not surprisingly, other states also have recognized this principle. *Cf. Delahunt v. Johnston*, 671 N.E.2d 1241 (Mass. 1996) (holding that a vote should be counted as a legal vote if it properly indicates the voter's intent with reasonable certainty); *Duffy v. Mortensen*, 497 N.W.2d 437 (S.D. 1993) (applying the rule that every marking found where a vote should be should be treated as an intended vote in the absence of clear evidence to the clear contrary); *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990) (holding that votes could be recounted by manual means to the extent that the voter's intent could be determined with reasonable certainty, despite the existence of a statute which provided that punch card ballots were to be recounted by automated tabulation equipment).

Accordingly, we conclude that a legal vote is one in which there is a "clear indication of the intent of the voter." We next address whether the term "rejection" used in section 102.168(3)(c) includes instances where the County Canvassing Board has not counted legal votes. Looking at the statutory scheme as a whole, it appears that the term "rejected" does encompass votes that may exist but have not been counted. As explained above, in 1999, the Legislature substantially revised the contest provision of the Election Code. *See* H.R. Comm. on Election Reform, HB 281 (February 3, 1999). One of the revisions to the contest provision included the codification of the grounds for contesting an election. *See id.* at 7. The House Bill noted that one of the

grounds for contesting an election at common law was the "Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." As noted above, the contest statute ultimately contained this ground for contesting the results of an election.

To further determine the meaning of the term "rejection", as used by the Legislature, we may also look to Florida case law. In *State ex rel. Clark v. Klingensmith*, 121 Fla. 297, 163 So. 704 (1935), an individual who lost an election brought an action for quo warranto challenging his opponent's right to hold office. The challenger challenged twenty-two ballots, which he divided into four groups. One of these groups included three ballots that the challenger claimed had not been counted. *See* 121 Fla. at 298, 163 So. at 705. This Court concluded that "the *rejection* of votes from legal voters, not brought about by fraud, and not of such magnitude as to demonstrate that a free expression of the popular will has been suppressed," is insufficient to void an election, "at least unless it be shown that the votes rejected would have changed the result." 121 Fla. at 300, 163 So. at 705. Therefore, the Court appears to have equated a "rejection" of legal votes with the failure to count legal votes, while at the same time recognizing that a sufficient number of such votes must have been rejected to merit relief. This notion of "rejected" is also in accordance with the common understanding of rejection of votes as used in other election cases. In discussing the facts in *Roudebush v. Hartke*, 405 U.S. 15 (1972), the United States Supreme Court explained:

> If a recount is conducted in any county, the voting machine tallies are checked and the sealed bags containing the paper ballots are opened. The recount commission may make new and independent determinations as to which ballots shall be counted. In other words, it may reject

ballots initially counted and count ballots initially rejected. *Id.*

This also comports with cases from other jurisdictions that suggest that a legal vote will be deemed to have been "rejected" where a voting machine fails to count a ballot, which has been executed in substantial compliance with applicable voting requirements and reflects, the clear intent of the voter to express a definite choice. *See In re Matter of the Petition of Katy Gray-Sadler*, 753 A.2d 1101, 1105-06 (N.J. 2000); *Moffat v. Blaiman*, 361 A.2d 74, 77 (N.J. Super. Ct. App. Div. 1976).

Here, then, it is apparent that there have been sufficient allegations made which, if analyzed pursuant to the proper standard, compel the conclusion that legal votes sufficient to place in doubt the election results have been rejected in this case.

THIS CASE

We must review the instances in which appellants claim that they established that legal votes were rejected or illegal voters were included in the certifications.

The refusal to review approximately 9,000 additional Miami-Dade Ballots, which the counting machine registered as non-votes and which have never been manually reviewed.

On November 9, 2000, the Miami-Dade County Democratic Party made a timely request under section 102.166 for a manual recount.[16] After first deciding against a full manual recount, the Miami-Dade County Canvassing Board voted to begin a manual recount of all

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[16]On November 9, 2000, a manual recount was requested on behalf of Vice-President Gore in four counties — Miami-Dade, Broward, Palm Beach and Volusia. Broward County and Volusia County timely completed a manual recount. It is undisputed that the results of the manual recounts in Volusia County and Broward County were included in the statewide certifications.

ballots cast in Miami-Dade County for the Presidential election, and the manual recount began on November 19, 2000. On November 21, 2000, this Court issued its decision in *Palm Beach Canvassing Board v. Harris*, 25 Fla. L. Weekly S1062 (Fla. Nov. 21, 2000), stating that amended certifications must be filed by 5 p.m. on Sunday, November 26, 2000. The Miami-Dade Canvassing Board thereafter suspended the manual recount and voted to use the election returns previously compiled. Earlier that day, the panel had decided to limit its recount to the 10,750 "undervotes," that is, ballots on which no vote was registered by counting machines. The Board's stated reason for the suspension of the manual recount was that it would be impossible to complete the recount before the deadline set forth by this Court. At the time that the Board suspended the recount, approximately 9,000 of the 10,750 undervotes had not yet been reviewed. In the two days that the Board had counted ballots, the Board identified 436 additional legal votes (from 20 percent of the precincts, representing 15 percent of the votes cast) which the machines failed to register, resulting in a net vote of 168 votes for Gore. Nonetheless, in addition to suspending further recounting, the Board also determined that it would not include the additional 436 votes that had been tabulated in its partially completed recount.

Specifically as to Miami-Dade County, the trial court found:

> *[A]lthough the record shows voter error, and/or, less than total accuracy, in regard to the punchcard voting devices utilized in Miami-Dade and Palm Beach Counties, which these counties have been aware of for many years*, these balloting and counting problems cannot support or effect any recounting necessity with respect to Miami-Dade County, absent the establishment of a reasonable probability that the

> statewide election result would be different, which has not been established in this case.
>
> The Court further finds that the Dade Canvassing Board did not abuse its discretion in any of its decisions in its review in recounting processes.

This statement is incorrect as a matter of law. In fact, as the Third District determined in *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Board*, 25 Fla. L. Weekly D2723 (Fla. 3d DCA Nov. 22, 2000), the results of the sample manual recount and the actual commencement of the full manual recount triggered the Canvassing Board's "mandatory obligation to recount all of the ballots in the county." In addition, the circuit court was bound at the time it ruled to follow this appellate decision. This Court has determined the decisions of the district courts of appeal represent the law of this State unless and until they are overruled by this Court, and therefore, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts. *See Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

However, regardless of this error, we again note the focus of the trial court's inquiry in an election contest authorized by the Legislature pursuant to the express statutory provisions of section 102.168 is not by appellate review to determine whether the Board properly or improperly failed to complete the manual recount. Rather, as expressly set out in section 102.168, the court's responsibility is to determine whether "legal votes" were rejected sufficient to change or place in doubt the results of the election. Without ever examining or investigating the ballots that the machine failed to register as a vote, the trial court in this case concluded that there was no probability of a different result. First, as we stated the trial court erred as a matter of law in utilizing the wrong standard. Second, and more importantly, by failing to examine the specifically identified group of uncounted ballots that is claimed to contain the

rejected legal votes, the trial court has refused to address the issue presented. Appellants have also been denied the very evidence that they have relied on to establish their ultimate entitlement to relief.[17] The trial court has presented the plaintiffs with the ultimate Catch-22, acceptance of the only evidence that will resolve the issue but a refusal to examine such evidence. We also note that whether or not the Board could have completed the manual recount by November 26, 2000, or whether the Board should have fulfilled its responsibility and completed the full manual recount it commenced, the fact remains that the manual recount was not completed through no fault of the Appellant.[18]

3300 Votes in Palm Beach County

Appellants also contend that the trial court erred in finding that they failed to satisfy their burden of proof with respect to the 3,300 votes that the Palm Beach County Canvassing Board reviewed and concluded did

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[17]The Miami-Dade Canvassing Board stated as its reasons that it stopped an ongoing manual recount because it determined that it could not meet this Court's certification deadline. However, nothing in this Court's prior opinion nor the statutory scheme governing manual recounts would have prevented the Board from continuing after certification the manual recount that it had properly started. The Canvassing Board is a neutral ministerial body. *See Morse v. Dade County Canvassing Board*, 456 So. 2d 1314 (Fla. 3d DCA 1984). Therefore, although the Board may have acted in a neutral fashion, the fact remains that three other Boards (Broward, Palm Beach and Volusia) completed the recounts.

[18]On Thanksgiving Day, November 23, 2000, an Emergency Petition for Writ for Mandamus was filed in which Gore sought to compel the Miami-Dade Canvassing Board to continue with the manual recount. Although we denied relief on that same day, in our order denying this relief, the Court specifically stated that the denial was "without prejudice to any party raising any issue presented in the writ in any future proceeding." Accordingly, at the time that we denied mandamus relief we clearly contemplated that this claim could be raised in a contest action.

not constitute "legal votes" pursuant to section 102.168(3)(c). However, unlike the approximately 9,000 ballots in Miami-Dade that the County Canvassing Board did not manually recount, the Palm Beach County Canvassing Board *did* complete a manual recount of these 3,300 votes and concluded that, because the intent of the voter in these 3,300 ballots was not discernable, these ballots did not constitute "legal votes." After a two-day trial in this case, the circuit court concluded:

> [W]ith respect to the approximately 3,300 Palm Beach County ballots of which plaintiffs seek review, the Palm Beach Board properly exercised its discretion in its counting process and has judged those ballots which plaintiffs wish this court to again judge de novo. . . . The Palm Beach County board did not abuse its discretion in its review and recounting process. Further, it acted in full compliance with the order of the circuit court in and for Palm Beach County.

We find no error in the trial court's determination that appellants did not establish a preliminary basis for relief as to the 3300 Palm Beach County votes because the appellants have failed to make a threshold showing that "legal votes" were rejected. Although the protest and contest proceedings are separate statutory provisions, when a manual count of ballots has been conducted by the Canvassing Board pursuant to section 102.166, the circuit court in a contest proceeding does not have the obligation de novo to simply repeat an otherwise-proper manual count of the ballots. As stated above, although the trial court does not review a Canvassing Board's actions under an abuse of discretion standard, the Canvassing Board's actions may constitute evidence that a ballot does or does not qualify as a legal vote. Because the appellants have failed to introduce any evidence to refute the Canvassing Board's determination that the 3300 ballots did not constitute "legal votes," we affirm the trial court's holding as to this is-

sue. This reflects the proper interaction of section 102.166 governing protests and manual recounts and section 102.168 governing election contests.

Whether the vote totals must be revised to include the legal votes actually identified in the Palm Beach County and Miami-Dade County manual recounts?

Appellants claim that the certified vote totals must be amended to include legal votes identified as being for one of the presidential candidates by the County Canvassing Boards of Palm Beach County and Miami-Dade during their manual recounts. After working for a period of many days, the Palm Beach County Canvassing Board conducted and completed a full manual recount in which the Board identified a net gain of 215 votes for Gore.[19] As discussed above, the Miami-Dade Canvassing Board commenced a manual recount but did not complete the recount. During the partial recount it identified an additional legal votes, of which 302 were for Gore and 134 were for Bush, resulting in a net gain of 168 votes for Gore.

The circuit court concluded as to Palm Beach County that there was not any "authority to include any returns submitted past the deadline established by the Florida Supreme Court in this election." This conclusion was erroneous as a matter of law. The deadline of November 26, 2000, at 5 p.m. was established in order to allow maximum time for contests pursuant to section 102.168. The deadline was never intended to prohibit legal votes identified after that date through ongoing manual recounts to be excluded from the statewide official results in the Election Canvassing Commission's certification of the results of a recount of less than all of a county's ballots. In the same decision we held that all returns must be considered unless their filing would effectively prevent an election contest from being con-

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[19]Bush asserted that the audited total is 176 votes.

ducted or endanger the counting of Florida's electors in the presidential election.

As to Miami-Dade County, in light of our holding that the circuit court should have counted the undervote, we agree with appellants that the partial recount results should also be included in the total legal votes for this election. Because the county canvassing boards identified legal votes and these votes could change the outcome of the election, we hold that the trial court erred in rejecting the legal votes identified in the Miami-Dade County and Palm Beach County manual recounts. These votes must be included in the certified vote totals. We find that appellants did not establish that the Nassau County Canvassing Board acted improperly.

CONCLUSION

Through no fault of appellants, a lawfully commenced manual recount in Dade County was never completed and recounts that were completed were not counted. Without examining or investigating the ballots that were not counted by the machines, the trial court concluded there was no reasonable probability of a different result. However, the proper standard required by section 102.168 was whether the results of the election were placed in doubt. On this record there can be no question that there are legal votes within the 9,000 uncounted votes sufficient to place the results of this election in doubt. We know this *not* only by evidence of statistical analysis but also by the actual experience of recounts conducted. The votes for each candidate that have been counted are separated by no more than approximately 500 votes and may be separated by as little as approximately 100 votes. Thousands of uncounted votes could obviously make a difference.

Although in all elections the Legislature and the courts have recognized that the voter's intent is paramount, in close elections the necessity for counting all legal votes becomes critical. However, the need for ac-

curacy must be weighed against the need for finality. The need for prompt resolution and finality is especially critical in presidential elections where there is an outside deadline established by federal law. Notwithstanding, consistent with the legislative mandate and our precedent, although the time constraints are limited, we must do everything required by law to ensure that legal votes that have not been counted are included in the final election results.[20] As recognized by the Florida House of Representatives Committee on Election Reform 1997 Interim Project on Election Contests and Recounts:

> [A]ll election contests and recounts can be traced to either an actual failure in the election system or a perception that the system has failed. Public confidence in the election process is essential to our democracy. *If the voter cannot be assured of an accurate vote count*, or an election unspoiled by fraud, *they will not have faith in other parts of the political process*. Nonetheless, it is inevitable that legitimate doubts of the validity and accuracy of election outcomes will arise. It is crucial, therefore, to have clearly defined legal mechanisms for contesting or recounting election results.

Id. at 21 (emphasis supplied) (footnote omitted).

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[20]This Presidential election has demonstrated the vulnerability of what we believe to be a bedrock principle of democracy: that every vote counts. While there are areas in this State which implement systems (such as the optical scanner) where the margins of error, and the ability to demonstrably verify those margins of error, are consistent with accountability in our democratic process, in these election contests based upon allegations that functioning punch-card voting machines have failed to record legal votes, the demonstrated margins of error may be so great to suggest that it is necessary to reevaluate utilization of the mechanisms employed as a viable system.

Only by examining the contested ballots, which are evidence in the election contest, can a meaningful and final determination in this election contest be made. As stated above, one of the provisions of the contest statute, section 102.168(8), provides that the circuit court judge may "fashion such orders as he . . . deems *necessary to ensure that each allegation in the complaint* is investigated, *examined* or checked, to prevent any alleged wrong, and to provide any *relief appropriate under such circumstances*. (emphasis supplied).

In addition to the relief requested by appellants to count the Miami-Dade undervote, claims have been made by the various appellees and intervenors that because this is a statewide election, statewide remedies would be called for. As we discussed in this opinion, we agree. While we recognize that time is desperately short, we cannot in good faith ignore both the appellant's right to relief as to their claims concerning the uncounted votes in Miami-Dade County nor can we ignore the correctness of the assertions that any analysis and ultimate remedy should be made on a statewide basis.[21]

We note that contest statutes vest broad discretion in the circuit court to "provide any relief appropriate under

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[21]The dissents would have us throw up our hands and say that because of looming deadlines and practical difficulties we should give up any attempt to have the election of the presidential electors rest upon the vote of Florida citizens as mandated by the Legislature. While we agree that practical difficulties may well end up controlling the outcome of the election we vigorously disagree that we should therefore abandon our responsibility to resolve this election dispute under the rule of law. We can only do the best we can to carry out our sworn responsibilities to the justice system and its role in this process. We, and our dissenting colleagues, have simply done the best we can, and remain confident that others charged with similar heavy responsibilities will also do the best they can to fulfill their duties as they see them.

the circumstances." Section 102.168(5). Moreover, because venue of an election contest that covers more than one county lies in Leon County, *see* 102.1685, Florida Statutes (2000), the circuit court has jurisdiction, as part of the relief it order, to order the Supervisor of Elections and the Canvassing Boards, as well as the necessary public officials, in all counties that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith, said tabulation to take place in the individual counties where the ballots are located.[22]

Accordingly, for the reasons stated in this opinion, we reverse the final judgment of the trial court dated December 4, 2000, and remand this cause for the circuit court to immediately tabulate by hand the approximate 9,000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed, and for other relief that may thereafter appear appropriate. The circuit court is directed to enter such orders as are necessary to add any legal votes to the total statewide certifications and to enter any orders necessary to ensure the inclusion of the additional legal votes for Gore in Palm Beach County[23] and the 168 additional legal votes from Miami-Dade County.

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[22]We are mindful of the fact that due to the time constraints, the count of the undervotes places demands on the public servants throughout the State to work over this week-end. However, we are confident that with the cooperation of the officials in all the counties, the remaining undervotes in these counties can be accomplished within the required time frame. We note that public officials in many counties have worked diligently over the past thirty days in dealing with exigencies that have occurred because of this unique historical circumstance arising from the presidential election of 2000. We commend those dedicated public servants for attempting to make this election process truly reflect the vote of all Floridians.

[23]*See* discussion at n.6, *supra*.

Because time is of the essence, the circuit court shall commence the tabulation of the Miami-Dade ballots immediately. The circuit court is authorized, in accordance with the provisions of section 102.168(8), to be assisted by the Leon County Supervisor of Elections or its sworn designees. Moreover, since time is also of the essence in any statewide relief that the circuit court must consider, any further statewide relief should also be ordered forthwith and simultaneously with the manual tabulation of the Miami-Dade undervotes.

In tabulating the ballots and in making a determination of what is a "legal" vote, the standards to be employed is that established by the Legislature in our Election Code which is that the vote shall be counted as a "legal" vote if there is "clear indication of the intent of the voter." Section 101.5614(5), Florida Statutes (2000).

It is so ordered.

ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.
WELLS, C.J., dissents with an opinion.
HARDING, J., dissents with an opinion, in which SHAW, J., concurs.

NO MOTION FOR REHEARING WILL BE ALLOWED.

WELLS, C.J., dissenting.

I join Justice Harding's dissenting opinion except as to his conclusions with regard to error by Judge Sauls and his conclusions as to the separateness of section 102.166 and 102.168, Florida Statutes (2000). I write separately to state my additional conclusions and concerns.

I want to make it clear at the outset of my separate opinion that I do not question the good faith or honorable intentions of my colleagues in the majority. However, I could not more strongly disagree with their deci-

sion to reverse the trial court and prolong this judicial process. I also believe that the majority's decision cannot withstand the scrutiny which will certainly immediately follow under the United States Constitution.

My succinct conclusion is that the majority's decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion. The majority returns the case to the circuit court for this partial recount of under-votes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown. That is but a first glance at the imponderable problems the majority creates.

Importantly to me, I have a deep and abiding concern that the prolonging of judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis. I have to conclude that there is a real and present likelihood that this constitutional crisis will do substantial damage to our country, our state, and to this Court as an institution.

On the basis of my analysis of Florida law as it existed on November 7, 2000, I conclude that the trial court's decision can and should be affirmed. Under our law, of course, a decision of a trial court reaching a correct result will be affirmed if it is supportable under any theory, even if an appellate court disagrees with the trial court's reasoning. *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-645 (Fla. 1999). I conclude that there are more than enough theories to support this trial court's decision.

There are two fundamental and historical principles of Florida law that this Court has recognized which are relevant here. First, at common law, there was no right

to contest an election; thus, any right to contest an election must be construed to grant only those rights that are explicitly set forth by the Legislature. *See McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981). In *Flynn*, we held that, "[a]t common law, except for limited application of quo warranto, there was no right to contest in court any public election, because such a contest is political in nature and therefore outside the judicial power." *Id.* at 667.

Second, this Court gives deference to decisions made by executive officials charged with implementing Florida's election laws. *See Krivanek v. Take Back Tampa Political Committee*, 625 So. 2d 840 (Fla. 1993). In *Krivanek*, we said:

> We acknowledge that election laws should generally be liberally construed in favor of an elector. However, the judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law. *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975), cert. denied, 425 U.S. 967, 96 S. Ct. 2162, 48 L. Ed. 2d 791 (1976). As noted in *Boardman*:
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> > The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties.... [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and

> promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law.

Id. at 844-45. These two concepts are the foundation of my analysis of the present case.

At the outset, I note that, after an evidentiary hearing, the trial court expressly found no dishonesty, gross negligence, improper influence, coercion, or fraud in the balloting and counting processes based upon the evidence presented. I conclude this finding should curtail this Court's involvement in this election through this case and is a substantial basis for affirming the trial court. Historically, this Court has only been involved in elections when there have been substantial allegations of fraud and then only upon a high threshold because of the chill that a hovering judicial involvement can put on elections. This to me is the import of this Court's decision in *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975). We lowered that threshold somewhat in *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 (Fla. 1998), but we continued to require a substantial noncompliance with election laws. That must be the very lowest threshold for a court's involvement.

Otherwise, we run a great risk that every election will result in judicial testing. Judicial restraint in respect to elections is absolutely necessary because the health of our democracy depends on elections being decided by voters–not by judges. We must have the self-discipline not to become embroiled in political contests whenever a judicial majority subjectively concludes to do so because the majority perceives it is "the right thing to do." Elections involve the other branches of government. A lack of self-discipline in being involved in elections, especially by a court of last resort, always has the poten-

tial of leading to a crisis with the other branches of government and raises serious separation-of-powers concerns.

I find that the trial judge correctly concluded that plaintiffs were not entitled to a manual recount. Petitioners filed this current election contest after protests in Palm Beach and Miami-Dade Counties. Section 102.168, Florida Statutes, in its present form is a new statute adopted by the Legislature in 1999. I conclude that the present statutory scheme contemplates that protests of returns[24] and requests for manual recounts[25] are first to be presented to the county canvassing boards. *See* § 102.166, Fla. Stat. This naturally follows from the fact that, even with the adoption of the 1999 amendments to section 102.168, the only procedures for manual recounts are in the protest statute. Once a protest has been filed, a county canvassing board then has the discretion, in accordance with the procedures set forth in section 102.166(4), Florida Statutes, whether to order a sample limited manual recount. *See* § 102.166(4)(c), Fla. Stat. (2000). Once the sample recount is complete and the county canvassing board concludes that there was an error in the vote tabulation that could affect the outcome of the election, section 102.166(5) instructs what must then be done. One option is to manually recount *all* ballots. *See* § 102.166(5)(c), Fla. Stat. (2000).[26]

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[24]*See* § 102.166(1), Fla. Stat. (2000).

[25]*See* § 102.166(4)(b), Fla. Stat. (2000).

[26]Also problematic with the majority's analysis is that the majority only *requires* that the "under-votes" are to be counted. How about the "over-votes?" Section 101.5614(6) provides that a ballot should not be counted "[i]f an elector marks more names than there are persons to be elected to an office," meaning the voter voted for more than one person for president. The underlying premise of the majority's rationale is that in such a close race a manual review of ballots rejected by the machines is necessary to ensure that all legal

I believe that the contest and protest statutes must logically be read together. The contest statute has significant references to the protest statute. If there is a protest, a party authorized by the statute to file a contest must file a complaint "within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to s. 102.166(1)." §102.168(2), Fla. Stat. (2000). In the election contest, the canvassing board is the proper party defendant under section 102.168(4). Further, under section 102.168(8), the circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that the allegations upon which the complaint is brought are investigated, examined, or checked.

I find correct the analysis undertaken in *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508 (Fla. 4th DCA 1992), a case recently cited by this Court in *Palm Beach County Canvassing Board v. Harris*, 25 Fla. L. Weekly S1062 (Fla. Nov. 21, 2000). In *Hogan*, the Fourth District Court of Appeal reversed the trial court's order granting a manual recount, in contravention of the county canvassing board's decision noting that:

> Although section 102.168 grants the right of contest, it does not change the discretionary aspect of the review procedures outlined in section 102.166. The statute clearly leaves the decision whether or not to hold a manual recount of the

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votes cast are counted. The majority, however, ignores the over-votes. Could it be said, without reviewing the over-votes, that the machine did not err in not counting them?

It seems patently erroneous to me to assume that the vote-counting machines can err when reading under-votes but not err when reading over-votes. Can the majority say, without having the over-votes looked at, that there are no legal votes among the over-votes?

> votes as a matter to be decided within the discretion of the canvassing board.

Id. at 510. I do not believe there is any sound reason to conclude that the Legislature's adoption of revised section 102.168 in 1999 intended to change this and provide for a duplicative recount by an individual circuit judge.

I also agree with the trial judge's conclusion that in a statewide election the only way a court can order a manual recount of ballots that were allegedly not counted because of some irregularity or inaccuracy in the balloting or counting process is to order that the votes in all counties in which those processes were used be recounted. I do not find any legal basis for the majority of this Court to simply cast aside the determination by the trial judge made on the proof presented at a two-day evidentiary hearing that the evidence did not support a statewide recount. To the contrary, I find the majority's decision in that regard quite extraordinary.

Section 102.168(3), Florida Statues (2000), states in pertinent part:

> The *grounds* for contesting an election under this section are:
>
> . . . .
>
> (c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(Emphasis added.) In other words, to establish a cause of action, plaintiff must allege an irregularity that places in doubt the result of the election. First, to "contest" simply means to challenge. *See Webster's Dictionary* 250 (10th ed. 1994). Second, section 102.168(5), provides:

> A statement of the *grounds of contest* may not be rejected, nor the proceedings dismissed, by the court for any want of form if the *grounds of contest* provided in the statement *are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.*

(Emphasis added.) Upon my reading of the statute, I conclude that the language "grounds of contest" unambiguously means: a basis upon which a plaintiff can establish a cause of action. This standard is simply the threshold that must be met to bring forth the contest action. Thus, this standard is *not* the standard that the judge must use in deciding whether a plaintiff who brings the contest has *successfully* met his or her burden to order a recount or set aside election results. Although it is unclear from case law what standard must be satisfied in order to grant appropriate relief, it undoubtedly cannot be a low standard. Recently, in *Beckstrom*, this Court declined to invalidate an election despite a finding that the canvassing board was grossly negligent and in substantial noncompliance with the absentee voting statutes. *See Beckstrom*. Thus, merely stating the cause of action under the contest statute does not entitle a party to a recount or require the court to set aside an election. More must be required. This is especially true here, where, as in *Beckstrom*, the trial judge found no dishonesty, gross negligence, improper influence, coercion, or fraud in the balloting and counting processes. Thus, a plaintiff's burden in establishing grounds on which a circuit judge could order relief of any kind was simply not met. It is illogical to interpret section 102.168(3)(c) to set such a low standard where a plaintiff merely has to allege a cause of action to successfully carry the contest.[27]

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[27]In addition, under a protest the threshold that must be met to order a recount must be lower than that under a contest, which

Furthermore, even conceding that the trial judge at the outset applied an erroneous "probability of doubt" standard in deciding that plaintiffs failed to meet their burden of establishing a cause of action, the trial judge faced a conundrum that must be adequately explained. Plaintiffs asked the trial judge to grant the very remedy–a recount of the under-votes–he prays for without first establishing that remedy was warranted. Before any relief is granted, a plaintiff must allege that enough legal votes were rejected to place in doubt the results of the election. However, in order for the plaintiffs to meet this burden, the under-vote ballots must be preliminarily manually recounted. Following this logic to its conclusion would require a circuit court to order partial manual recounts upon the mere filing of a contest. This proposition plainly has no basis in law.

As I have stated, I conclude in the case at bar that sections 102.166 and 106.168 must be read in pari materia. My analysis in this regard is bolstered in situations, as here, where there was an initial protest filed in a county pursuant to section 102.166 and a subsequent contest of that same county's return pursuant to section 102.168. It appears logical to me that a circuit judge in a section 102.168 contest should review a county canvassing board's determinations in a section 102.166 protest under an abuse-of-discretion standard. I see no other reason why the county canvassing board would be a party defendant if the circuit court is not intended to evaluate the canvassing board's decisions with respect to manual recount decisions made in a section 102.166 protest. Finally, it is plain to me that it is only in section 102.166 that there are any procedures for manual recounts which address the logistics of a recount, includ-

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action can only be brought after certification of the returns. Therefore, the threshold to successfully carry a contest must be higher than that of a mere protest.

ing who is to conduct the count, that it is to take place in public, and what is to be recounted.[28]

The majority quotes section 101.5614(5) for the proposition of settling how a county canvassing board should count a vote. The majority states that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." § 101.5614(5), Fla. Stat. (2000). Section 101.5614(5), however, is a statute that authorizes the creation of a duplicate ballot where a "ballot card . . . is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment." There is no basis in this record that suggests that the approximately 9000 ballots from Miami-Dade County were damaged or defective.

Laying aside this problem and assuming the majority is correct that section 101.5614(5) correctly annunciates the standard by which a county canvassing board should judge a questionable ballot, section 101.5614(5) utterly fails to provide any meaningful standard. There is no doubt that every vote should be counted where there is a "clear indication of the intent of the voter." The problem is how a county canvassing board translates that directive to these punch cards. Should a county canvassing board count or not count a "dimpled chad" where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection con-

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[28]I am persuaded that even with these procedures manual recounts by the canvassing board are constitutionally suspect. *See Touchston v. McDermott*, No. 00-15985 (U.S. 11th Cir. Dec. 6, 2000) (Tjoflat, J., dissenting). This would be compounded by giving that power to an individual circuit judge and providing him or her with no standards.

cerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.[29]

Based upon this analysis and adhering to the interpretation of the 1992 *Hogan* case, I conclude the circuit court properly looked at what the county canvassing boards have done and found that they did not abuse their discretion. Regarding Miami-Dade County, I find that the trial judge properly concluded that the Miami-Dade Canvassing Board did not abuse its discretion in deciding to discontinue the manual recount begun on November 19, 2000. Evidence presented at trial indicated that the Miami-Dade Board made three different decisions in respect to manual recounts. The first decision was not to count, the second was to count, and the third was not to count. The third decision was based upon the determination by the Miami-Dade Board that it could not make the November 26, 2000, deadline set by this Court in *Harris* and that it did not want to jeopardize disenfranchising a segment of its voters. The law does not require futile acts. *See Haimovitz v. Robb*, 130 Fla. 844; 178 So. 827 (1937). Section 102.166(5)(c) *requires that, if there is a manual recount, all of the ballots have to be recounted.* I cannot find that the Miami-Dade Board's decision that *all* the ballots could not be manually recounted between November 22 and November 26, 2000, to be anything but a decision based upon reality. Moreover, not to count all of the ballots if any were to be recounted would plainly be changing the rules after the election and would be unfairly discriminatory against votes in the precincts in which there was no manual recount. Thus, I agree with the trial court that the Miami-Dade Board did not abuse its discretion in discontinuing the manual recount.

In respect to the Palm Beach County Canvassing Board, I likewise find that the trial judge did not err in

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[29] *See* n.5.

finding that the Palm Beach Board was within its discretion in rejecting the approximately 3300 votes in which it could not discern voter intent. As set forth in *Boardman*, the county canvassing boards are vested with the responsibility to make judgments on the validity of ballots, and its determinations will be overturned *only* for compelling reasons when there are clear, substantial departures from essential requirements of law. *See id.*, 323 So. 2d at 268 n 5. Petitioners have not met this burden.

I also agree with the trial judge that the Election Canvassing Commission (Commission) did not abuse its discretion in refusing to accept either an amended return reflecting the results of a partial manual recount or a late amended return filed by the Palm Beach Board. I conclude that it is plain error for the majority to hold that the Commission abused its discretion in enforcing a deadline set by this Court that recounts be completed and certified by November 26, 2000. I conclude that this not only changes a rule after November 7, 2000, but it also changes a rule this Court made on November 26, 2000.

As I stated at the outset, I conclude that this contest simply must end.

Directing the trial court to conduct a manual recount of the ballots violates article II, section 1, clause 2 of the United States Constitution, in that neither this Court nor the circuit court has the authority to create the standards by which it will count the under-voted ballots. The Constitution reads in pertinent part: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." Art. II, § 1, cl. 2, U.S. Const. The Supreme Court has described this authority granted to the state legislatures as "plenary." *See McPherson v. Blacker*, 146 U.S. 1, 7 (1892). "Plenary" is defined as "full, entire, complete, absolute, perfect, [and] unqualified." *Black's Law Dictionary* 1154 (6th ed. 1990).

The Legislature has given to the county canvassing boards–and only these boards–the authority to ascertain the intent of the voter. *See* § 102.166(7)(b), Fla. Stat. (2000). Just this week, the United States Supreme Court reminded us of the teachings from *Blacker* when it said:

> [Art. II, §1, cl. 2] does not read that the people or the citizens shall appoint, but that 'each State shall'; and if the words 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself."

Bush v. Palm Beach Canvassing Bd., No. 00-836, slip op. at 4-5 (U.S. Dec. 4, 2000) (quoting *Blacker*, 146 U.S. at 7). Clearly, in a presidential election, the Legislature has not authorized the courts of Florida to order partial recounts, either in a limited number of counties or statewide. This Court's order to do so appears to me to be in conflict with the United States Supreme Court decision.

Laying aside the constitutional infirmities of this Court's action today, what the majority actually creates is an overflowing basket of practical problems. Assuming the majority recognizes a need to protect the votes of Florida's presidential electors,[30] the entire contest must

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[30]As the Supreme Court recently noted, 3 U.S.C. § 5 creates a safe harbor provision regarding congressional consideration of a state's electoral votes should all contests and controversies be resolved at least six days prior to December 18, 2000, if made pursuant to the state of the law as it existed on election day. *See Bush* at 6. There

be completed "at least six days before" December 18, 2000, the date the presidential electors meet to vote. *See* 3 U.S.C. § 5 (1994). The safe harbor deadline day is December 12, 2000. Today is Friday, December 8, 2000. Thus, under the majority's time line, all manual recounts must be completed in five days, assuming the counting begins today.

In that time frame, all questionable ballots must be reviewed by the judicial officer appointed to discern the intent of the voter in a process open to the public.[31] Fairness dictates that a provision be made for either party to object to how a particular ballot is counted. Additionally, this short time period must allow for judicial review. I respectfully submit this cannot be completed without taking Florida's presidential electors outside the safe harbor provision, creating the very real possibility of disenfranchising those nearly six million voters who were able to correctly cast their ballots on election day.

Another significant problem is that the majority returns this case to the circuit court for a recount with no standards. I do not, and neither will the trial judge, know whether to count or not count ballots on the criteria used by the canvassing boards, what those criteria are, or to do so on the basis of standards divined by Judge Sauls. A continuing problem with these manual recounts is their reliability. It only stands to reason that many times a reading of a ballot by a human will be subjective, and the intent gleaned from that ballot is only in the mind of the beholder. This subjective counting is only compounded where no standards exist or, as in this statewide contest, where there are no statewide standards for determining voter intent by the various can-

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is no legislative suggestion that the Florida Legislature did not want to take advantage of this safe harbor provision.

[31] *See* § 102.166(6), Fla. Stat. (2000).

vassing boards, individual judges, or multiple unknown counters who will eventually count these ballots.

I must regrettably conclude that the majority ignores the magnitude of its decision. The Court fails to make provision for: (1) the qualifications of those who count; (2) what standards are used in the count–are they the same standards for all ballots statewide or a continuation of the county-by-county constitutionally suspect standards; (3) who is to observe the count; (4) how one objects to the count; (5) who is entitled to object to the count; (6) whether a person may object to a counter; (7) the possible lack of personnel to conduct the count; (8) the fatigue of the counters; and (9) the effect of the differing intra-county standards.

This Court's responsibility must be to balance the contest allegations against the rights of all Florida voters who are not involved in election contests to have their votes counted in the electoral college. To me, it is inescapable that there is no practical way for the contest to continue for the good of this country and state.

I am persuaded that Justice Terrell was correct in 1936 when he said:

> This court is committed to the doctrine that extraordinary relief will not be granted in case where it plainly appears that although the complaining party may be ordinarily entitled to it, *if the granting of such relief in the particular case will result in confusion and disorder and will produce an injury to the public which outweighs the individual right of the complainant to have the relief he seeks.*

State v. Wester, 126 Fla. 49, 54, 170 So. 736, 738-39 (1936) (citations omitted; emphasis added).

For a month, Floridians have been working on this problem. At this point, I am convinced of the following.

First, there have been an enormous number of citizens who have expended heroic efforts as members of canvassing boards, counters, and observers, and as legal counsel who have in almost all instances, in utmost good faith attempted to bring about a fair resolution of this election. I know that, regardless of the outcome, all of us are in their debt for their efforts on behalf of representative democracy.

Second, the local election officials, state election officials, and the courts have been attempting to resolve the issues of this election with an election code which any objective, frank analysis must conclude never contemplated this circumstance. Only to state a few of the incongruities, the time limits of sections 102.112, 102.166, and 102.168 and 3 U.S.C. §§ 1, 5, and 7 simply do not coordinate in any practical way with a presidential election in Florida in the year 2000. Therefore, section 102.168, Florida Statues, is inconsistent with the remedy being sought here because it is unclear in a presidential election as to: (1) whether the candidates or the presidential electors should be party to this election contest; (2) what the possible remedy would be; and (3) what standards to apply in counting the ballots statewide.

Third, under the United States Supreme Court's analysis in *Bush v. Palm Beach County Canvassing Board*, wherein the Supreme Court calls to our attention *McPherson v. Blacker*, 146 U.S. 1 (1892), there is uncertainty as to whether the Florida Legislature has even given the courts of Florida any power to resolve contests or controversies in respect to presidential elections.

Fourth, there is no available remedy for the petitioners on the basis of these allegations. Quite simply, courts cannot fairly continue to proceed without jeopardizing the votes and rights of other citizens through a further count of these votes.

I must take seriously the counsel of the Supreme Court in *Bush*:

> Since [3 U.S.C.] §5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.

Id. at 6.

This case has reached the point where finality must take precedence over continued judicial process. I agree with a quote from John Allen Paulos, a professor of mathematics at Temple University, when he wrote that, "[t]he margin of error in this election is far greater than the margin of victory, no matter who wins."[32] Further judicial process will not change this self-evident fact and will only result in confusion and disorder. Justice Terrell and this Court wisely counseled against such a course of action sixty-four years ago. I would heed that sound advice and affirm Judge Sauls.

HARDING, J., dissenting.

I would affirm Judge Sauls' order because I agree with his ultimate conclusion in this case, namely that the Appellants failed to carry their requisite burden of proof and thus are not entitled to relief. However, in reaching his conclusion, Judge Sauls applied erroneous standards in two instances. First, in addressing the Appellants' challenges of the election certifications in Miami-Dade and Palm Beach Counties, the judge stated that "[t]he local boards have been given broad discretion, which no court may overrule, absent a clear abuse of discretion."

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[32] "*The election is a tie, so let's get on with it,*" St. Petersburg Times, Dec. 3, 2000, at 3D.

Applying this standard, the judge concluded that the Miami-Dade County Canvassing Board did not abuse its discretion in any of its decisions in the review and recounting process. While abuse of discretion is the proper standard for assessing a canvassing board's actions in a section 102.166 protest proceeding, it is not applicable to this section 102.168 contest proceeding. Judge Sauls improperly intertwined these two proceedings and the standards applicable to each.

In 1999, the Florida Legislature extensively amended the contest statute to specify the grounds authorized for contesting an election and to set up a time frame for contests. *See* ch. 99-339, § 3, at 3547-49, Laws of Fla. The Legislature also amended the protest statute by eliminating the role of the circuit courts in protest proceedings. *See id.*, §1, at 3546. The county canvassing boards have been granted discretion to authorize a manual recount when requested by a candidate, political party, or political committee who seeks to protest the returns of an election as being erroneous. *See* § 102.166(4)(c), Fla. Stat. (2000) ("The county canvassing board *may* authorize a manual recount.") (emphasis added).

In contrast, a contest proceeding involves a legal challenge to the outcome of an election. The circuit judge is statutorily charged with three tasks in a contest proceeding: (1) to ensure that each allegation in the contestant's complaint is investigated, examined, or checked; (2) to prevent or correct any alleged wrong; and (3) to provide any relief appropriate under such circumstances. *See* § 102.168(8), Fla. Stat. (2000). Where a contestant alleges that the canvassing board has rejected a number of legal votes "sufficient to change or place in doubt the result of the election" due to the board's decision to curtail or deny a manual recount, the circuit judge should examine this issue de novo and not under an abuse of discretion standard. § 102.168(3)(c), Fla. Stat. (2000).

Second, Judge Sauls erred in concluding that a contestant under section 102.168(3)(c) must show a "reasonable probability that the results of the election would have been changed." Judge Sauls cited the First District Court of Appeal's decision in *Smith v. Tynes*, 412 So. 2d 925, 926 (Fla. 1st DCA 1982), as establishing this standard for election contests. However, as discussed above, when the Legislature amended section 102.168 in 1999, it specified five grounds for contesting an election, including the "[r]eceipt of a number of illegal votes or rejection of a number of legal votes *sufficient to change or place in doubt the result of the election.*" (Emphasis added.) *Smith v. Tynes*, which was decided in 1982, addressed the pre-amendment statute which did not specify the grounds for a contest. Thus, the current statutory standard controls here.

While I disagree with Judge Sauls on the standards applicable to this election contest, I commend him for the way that he conducted the proceedings below under extreme time constraints and pressure. Further, I believe that Judge Sauls properly concluded that there was no authority to include the Palm Beach County returns filed after the explicit deadline established by this Court.

I conclude that the application of the erroneous standards is not determinative in this case. I agree with Judge Sauls that the Appellants have not carried their burden of showing that the number of legal votes rejected by the canvassing boards is sufficient to change or place in doubt the result of this *statewide* election. That failure of proof controls the outcome here. Moreover, as explained below, I do not believe that an adequate remedy exists under the circumstances of this case.

I conclude that Judge Sauls properly found that the evidence presented by Appellants, even if believed, was insufficient to warrant any remedy under section 102.168.

The basis for Appellants claim for relief under section 102.168 is that there is a "no-vote" problem, i.e., ballots which, although counted by machines at least once, allegedly have not been counted in the presidential election. The evidence showed that this no-vote problem, to the extent it exists, is a statewide problem.[33] Appellants ask that only a subset of these no-votes be counted.

In a presidential election, however, section 102.168, by its title, is an "Election" contest and, as such, it is not a local contest seeking to define the correct winner of the popular vote in any individual county. The action is to determine whether the Secretary of State certified the correct winner for the entire State of Florida. By its plain language, section 102.168(1) provides that only the "unsuccessful candidate" may contest an election. If this contest provision may be invoked as to individual county results, as argued by Appellants, then Vice President Gore's choice of the three particular counties was improper because he was not "unsuccessful" in those counties. I read the statute as applying to *statewide results* in statewide elections. Thus, Vice President Gore, as the unsuccessful candidate statewide, could contest the election results. However, in this contest proceeding, Appellants had an obligation to show, by a preponderance of the evidence, that the outcome of the statewide election would likely be changed by the relief they sought.

Appellants failed, however, to provide any meaningful statistical evidence that the outcome of the Florida

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[33]No-votes (ballots for which the no vote for Presidential electors was recorded) exist throughout the state, not just in the counties selected by Appellants. Of the 177,655 no-votes in the November 7, 2000, election in Florida, 28,492 occurred in Miami-Dade County and 29,366 occurred in Palm Beach County. *See* Division of Elections, Voter Turnout Report, S-DX 41; Division of Elections, General Election Results, S-DX 40.

election would be different if the "no-vote" in other counties had been counted; their proof that the outcome of the vote in two counties would likely change the results of the election was insufficient. It would be improper to permit Appellants to carry their burden in a statewide election by merely demonstrating that there were a sufficient number of no-votes that could have changed the returns in isolated counties. Recounting a subset of counties selected by the Appellants does not answer the ultimate question of whether a sufficient number of uncounted legal votes could be recovered from the statewide "no-votes" to change the result of the statewide election. At most, such a procedure only demonstrates that the losing candidate would have had greater success in the subset of counties most favorable to that candidate.

Moreover, assuming that there may be some shortfall in counting the votes cast with punch card ballots, such a problem is only properly considered as being systemic with the punch card system itself, and any remedy would have had to be statewide. Any other remedy would disenfranchise tens of thousands of other Florida voters, as I have serious concerns that Appellant's interpretation of 102.168 would violate other voters' rights to due process and equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution.

As such, I would find that the selective recounting requested by Appellant is not available under the election contest provisions of section 102.168. Such an application does not provide for a more accurate reflection of the will of the voters but, rather, allows for an unfair distortion of the statewide vote. It is patently unlawful to permit the recount of "no-votes" in a single county to determine the outcome of the November 7, 2000, election for the next President of the United States. We are a nation of laws, and we have survived and prospered as

a free nation because we have adhered to the rule of law. Fairness is achieved by following the rules.

Finally, even if I were to conclude that the Appellant's allegations and evidence were sufficient to warrant relief, I do not believe that the rules permit an adequate remedy under the circumstances of this case. This Court, in its prior opinion, and all of the parties agree that election controversies and contests must be finally and conclusively determined by December 12, 2000. *See* 3 U.S.C. § 5. This Court is "not required to do a useless act nor are we required to act if it is impossible for us to grant effectual relief." *State v. Strasser*, 445 So. 2d 322, 322 (Fla. 1983). *See also Hoshaw v. State*, 533 So. 2d 886, 887 (Fla. 3d DCA 1988) ("The law does not require futile acts."); *International Fidelity Ins. Co. v. Prestige Rent-A-Car, Inc.*, 715 So. 2d 1025, 1028 (Fla. 5th DCA 1998) ("Florida law does not require trial courts to enter orders which are impossible to execute or which require parties to perform acts that cannot be of any force or effect."). Clearly, the only remedy authorized by law would be a statewide recount of more than 170,000 "no-vote" ballots by December 12. Even if such a recount were possible, speed would come at the expense of accuracy, and it would be difficult to put any faith or credibility in a vote total achieved under such chaotic conditions. In order to undertake this unprecedented task, the majority has established standards for manual recounts–a step that this Court refused to take in an earlier case,[34] presumably because there was no authority for such action and nothing in the record to guide the Court in setting such standards. The same circumstances exist in this case. All of the parties should be afforded an opportunity to be heard on this very important issue.

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[34]*See Palm Beach County Canvassing Bd. v. Harris*, Nos. SC00-2346, SC00-2348, SC00-2349 (Fla. Nov. 21, 2000), *vacated by Bush v. Palm Beach Canvassing Bd.*, 531 U.S. ____ (2000).

While this Court must be ever mindful of the Legislature's plenary power to appoint presidential electors, *see* U.S. Const. art. II, § 1, cl. 2, I am more concerned that the majority is departing from the essential requirements of the law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos. In giving Judge Sauls the option to order a statewide recount, the majority permits a remedy which was not prayed for, which is based upon a premise for which there is no evidence, and which presents Judge Sauls with options to order entities (i.e. local canvassing boards) to conduct recounts when they have not been served, have not been named as parties, but, most importantly, have not had the opportunity to be heard. In effect, the majority is allowing the results of the statewide election to be determined by the manual recount in Miami-Dade County because a statewide recount will be impossible to accomplish. Even if by some miracle a portion of the statewide recount is completed by December 12, a partial recount is not acceptable. The uncertainty of the outcome of this election will be greater under the remedy afforded by the majority than the uncertainty that now exists.

The circumstances of this election call to mind a quote from football coaching legend Vince Lombardi: "We didn't lose the game, we just ran out of time."

SHAW, J., concurs.

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APPENDIX B

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO.: CV 00-2808

ALBERT GORE, JR., Nominee of the Democratic Party of the United States, and JOSEPH I. LIEBERMAN, Nominee of the Democratic Party of the United States for Vice President of the United States,

Plaintiffs,

v.

KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, ET AL.,

Defendants.

[Dec. 4, 2000]

FINAL JUDGMENT

This action was tried before the court. The findings and conclusions in the ruling of the court from the bench in open court this day shall become a part hereof. Accordingly it is

ORDERED AND ADJUDGED that Plaintiffs Albert Gore, Jr. and Joseph I. Lieberman shall take nothing by the action and the Defendants may go hence without day.

DONE AND ORDERED in Chambers this 4th day December, 2000.

/s/
N. SANDERS SAULS
CIRCUIT JUDGE

APPENDIX C

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

ALBERT GORE, JR., et al.,

Plaintiffs,

vs.

KATHERINE HARRIS, as Secretary of State, STATE OF FLORIDA, et al.,

Defendants.

IN RE:	Ruling	
BEFORE:	HONORABLE N. SANDERS SAULS Circuit Court Judge	
DATE:	**Monday, December 3, 2000**	
TIME:	Commenced:	4:30 p.m.
	Concluded:	6:31 p.m.
LOCATION:	Leon County Courthouse Courtroom 3D Tallahassee, Florida	

Text of the decision by Judge N. Sanders Sauls of Leon County Circuit Court on Democratic presidential candidate Al Gore's contest of Florida's certified election results, as read by Sauls to the Courtroom:

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SAULS: All right. At this time we'd call the case of Albert Gore, et al, versus Katherine Harris, et al., Case Number 00-2808.

At this time, the action having been tried, the Court at this time will enter its rulings from the bench, as to

the exigencies surrounding this case, the rulings and findings shall be incorporated into the final judgment, and shall be immediately entered herein.

At this time, the Court finds and concludes as follows: The complaint filed herein states in its first paragraph that this is an action to contest the state certification in the presidential election of 2000, asserting that the State Elections Canvassing Commission's certification on in November 26, 2000, was erroneous, and the vote totals wrongly include illegal votes, and do not include legal votes that were improperly rejected.

Plaintiffs further contest the State of Florida's certification of the electors for George W. Bush and Richard Cheney as being elected.

They further challenge and contest the election certifications of the Canvassing Boards of Dade, Palm Beach, and Nassau Counties.

As to the Dade Canvassing Board, Plaintiffs seek to compel the Dade board to include in its certification, and

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the State Elections Canvassing Commission to include in the certification, a six-vote change in favor of Plaintiffs, resulting from the board's initial test and partial manual recount of one-percent of the countywide vote total conducted with respect to three precincts, designated by the Plaintiffs designees.

Also, additional votes manually hand-counted, and a further partial recount total resulting from the board's discretionary decision to stop completion of a full manual recount of all of the votes and all the precincts in Dade, because of insufficiency of time to complete the same.

These represent the results of the count of an additional 136 precincts of the 635 precincts in Dade County.

And, also, the results of any Court order, manual review and recount of some nine to ten thousand voter cards or ballots, which at Plaintiff's request, have been separated, or were separated as alleged undervotes by the Dade Canvassing Board, or the Dade Supervisor of Elections, as a result of all of the countywide ballots being processed through the counting machines a third time and being nonreadable by the machine.

As to the Palm Beach Canvassing Board, Plaintiffs seek to compel the Palm Beach board to include in its certification, and the State Elections Canvassing Commission to include in the state certification, additional votes

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representing the results of an attempted partial certification of results, completed before the November 26, 2000 deadline, mandated by the Florida Supreme Court, as well as the additional remainder of the results of the manual recount, which was completed after the deadline, and the attempted certification thereof on December 1.

And in addition, the result of any Court ordered manual review and recount of some 3,300 ballots which were objected to during the Palm Beach board's manual recount which Plaintiffs allege should have been counted as ballot votes because that board used an improper standard.

As to Nassau, the Nassau County Canvassing Board, the Plaintiffs seek to compel the Nassau board to amend its certification, and the State Elections Canvassing Commission to amend the state certification to reflect and include the results of the board's machine recount, rather than the results of the board's original machine count, thereby resulting in a favorable net gain to Plaintiffs, of 51 votes.

It is the established law of Florida as reflected in State v. Smith that where changes or charges of irregu-

larity of procedure or inaccuracy of returns in balloting and counting processes have been alleged, that the Court must find as a fact that a legal basis for ordering any recount exists before ordering such recount.

Further, it is well-established and reflected in the

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opinion of Judge Joanas and Smith v. Tine, that in order to contest election results under Section 102.168 of the Florida statutes, the Plaintiff must show that, but for the irregularity, or inaccuracy claimed, the result of the election would have been different, and he or she would have been the winner.

It is not enough to show a reasonable possibility that election results could have been altered by such irregularities or inaccuracies, rather, a reasonable probability that the results of the election would have been changed must be shown.

In this case, there is no credible statistical evidence, and no other competent substantial evidence to establish by a preponderance of a reasonable probability that the results of the statewide election in the State of Florida would be different from the result which has been certified by the State Elections Canvassing Commission.

The Court further finds and concludes the evidence does not establish any illegality, dishonesty, gross negligence, improper influence, coercion, or fraud in the balloting and counting processes.

Secondly, there is no authority under Florida law or certification of an incomplete manual recount of a portion of, or less than all ballots from any county by the state elections canvassing commission, nor authority to include any

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returns submitted past the deadline established by the Florida Supreme Court in this election.

Thirdly, although the record shows voter error, and/or, less than total accuracy, in regard to the punch-card voting devices utilized in Dade and Palm Beach Counties, which these counties have been aware of for many years, these balloting and counting problems cannot support or effect any recounting necessity with respect to Dade County, absent the establishment of a reasonable probability that the statewide election result would be different, which has not been established in this case.

The Court further finds the Dade Canvassing Board did not abuse its discretion in any of its decisions in its review in recounting processes.

Fourthly, with respect to the approximate 3,300 Palm Beach County ballots of which Plaintiffs seek review, the Palm Beach Board properly exercised its discretion in its counting process, and has judged those ballots which Plaintiff wish this Court to, again, judge de novo.

The old cases upon which Plaintiff rely were rendered upon mandamus prior to the modern statutory election system and remedial scheme enacted by the Legislature of the State of Florida in chapter 102 of the Florida Statutes.

The local boards have been given broad discretion which no Court may overrule, absent a clear abuse of discretion.

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The Palm Beach County Board did not abuse its discretion in its review and recounting process.

Further, it acted in full compliance with the order of the Circuit Court in and for Palm Beach County.

Having done so, Plaintiffs are estopped from further challenge of this process and standards. It should be noted, however, that such process and standards were

changed from the prior 1990 standards, perhaps contrary to Title III, Section (5) of the United States Code.

Furthermore, with respect to the standards utilized by the Board in its review and-counting processes, the Court finds that the standard utilized was in full compliance with the law and reviewed under another standard would not be authorized, thus creating a two-tier situation within one county, as well as with respect to other counties.

The Court notes that the Attorney General of the State of Florida enunciated his opinion of the law with respect to this, in a letter dated November 14, 2000, to the Honorable Charles E. Burton, Chair of the Palm Beach County Canvassing Board, which, in part, is as follows: "A two-tier system would have the effect of treating voters differently, depending upon what county they voted in."

The voter in a county where a manual count was conducted, would benefit from having a better chance of having his or her vote actually counted, than a voter in a

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county where a hand count was halted. As the State's chief legal officer, I feel a duty to warn that the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official Canvassing Boards, the State will incur a legal jeopardy under both the United States and the state constitutions.

This legal jeopardy could potentially leave Florida having all of its votes, in effect, disqualified, and this state being barred from the Electoral College's election of a President.

The Court finds further that the Nassau County Canvassing Board did not abuse its discretion in its certification of Nassau County's voting results.

Such actions were not void or illegal, and it was done with the proper exercise – within the proper exercise of its discretion upon adequate and reasonable public notice.

Further, this Court would further conclude and find that the properly stated cause of action under Section 102.168 of the Florida Statutes to contest a statewide federal election, the Plaintiff would necessarily have to place at issue and seek as a remedy with the attendant burden of proof, a review and recount on all ballots, and of all the counties in this state with respect to the particular alleged irregularities or inaccuracies in

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the balloting or counting processes alleged to have occurred.

As recently stated by Judge Kline with the concurrence of Chief Judge Warner in the Fourth District Court of Appeal case, of Bedell v. Palm Beach Canvassing Board, Section 102.168 provides in Subsection (1) that the certification of elections may be contested for presidential elections. Section 103.011 provides that, "The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes."

There is in this type of election, one statewide election, and one certification. Palm Beach County did not elect any person as a presidential elector, but, rather, the election with the winner-take-all proposition, dependent on the statewide vote.

Finally, for the purpose of expedition, due to the exigencies surrounding these proceedings, this Court will deny those portions of the pending motions to dismiss of the various parties herein not affected by or ruled upon in these findings and conclusions in those portions consisting solely of matters of law being reviewable upon such denial.

In conclusion, the Court finds that the Plaintiff failed to carry the requisite burden of proof, and judgment shall be hereby entered, and that Plaintiffs will take nothing by this action. All ballots in the possession of the Clerk of this Court shall remain pending review. A judgment will be entered and filed with the Clerk immediately following this hearing.

(HEARING CONCLUDED AT 4:48 P.M.)

APPENDIX D

SUPREME COURT OF FLORIDA

NOS. SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD,
Petitioner,
vs.
KATHERINE HARRIS, etc., et al.
Respondents.

VOLUSIA COUNTY CANVASSING BOARD, et al.,
Appellants,
vs.
KATHERINE HARRIS, etc., et al.
Appellees.

FLORIDA DEMOCRATIC PARTY,
Appellant,
vs.
KATHERINE HARRIS, etc., et al.
Appellees.

[Nov. 21, 2000]

PER CURIAM.

We have for review two related trial court orders appealed to the First District Court of Appeal, which certified the orders to be of great public importance requiring immediate resolution by this Court (Case Numbers SC00-2348 and SC00-2349). We have jurisdiction under article V, section 3(b)(5) of the Florida Constitution. For the reasons set forth in this opinion, we reverse the orders of the trial court.[1]

I. FACTS

A. The Election

On Tuesday, November 7, 2000, the State of Florida, along with the rest of the United States, conducted a general election for the President of the United States. The Division of Elections ("Division") reported on Wednesday, November 8, that George W. Bush, the Republican candidate, had received 2,909,135 votes, and Albert Gore Jr., the Democratic candidate, had received 2,907,351 votes. Because the overall difference in the total votes cast for each candidate was less than one-half of one percent of the total votes cast for that office (i.e., the difference was 1,784 votes), an automatic recount was conducted pursuant to section 102.141(4), Florida Statutes.[2] The recount resulted in a substantially re-

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[1]The Palm Beach County Canvassing Board has filed in this Court an "Emergency Petition for Extraordinary Writ" against Secretary of State Katherine Harris and others (Case Number SC00-2346). We have examined our jurisdiction under article V, section 3(b)(8) of the Florida Constitution. However, because the issue raised by that separate petition can be disposed of in our pending case and because we have previously stated in our order of November 16, 2000, that there was "no legal impediment" to the manual recounts continuing, we deem it unnecessary to determine if we have a separate basis of jurisdiction for entertaining the writ. Accordingly, by separate order we dismiss the petition.

[2]Section 102.141(4), Florida Statutes (2000), provides in pertinent part:

duced figure for the overall difference between the two candidates.

In light of the closeness of the election, the Florida Democratic Executive Committee on Thursday, November 9, requested that manual recounts be conducted in Broward, Palm Beach, and Volusia Counties pursuant to section 102.166, Florida Statutes (2000).[3] Pursuant to section 102.166(4)(d), the county canvassing boards of these counties conducted a sample manual recount of at least one percent of the ballots cast. Initial manual recounts demonstrated the following: In Broward County, a recount of one percent of the ballots indicated a net increase of four votes for Gore; and in Palm Beach County, a recount of four sample precincts yielded a net increase of nineteen votes for Gore. Based on these recounts, several of the county canvassing boards determined that the manual recounts conducted indicated "an error in the vote tabulation which could affect the outcome of the election." Based on this determination, several canvassing boards voted to conduct countywide manual recounts pursuant to section 102.166(5)(c).

B. The Appeal Proceedings

Concerned that the recounts would not be completed prior to the deadline set forth in section 102.111(1), Florida Statutes (2000), requiring that all county returns be certified by 5 p.m. on the seventh day after an election, the Palm Beach County Canvassing Board, pursuant to section 106.23, Florida Statutes (2000), sought an

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> (4) If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office . . . the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure.

[3]We have not discussed the events in Miami-Dade County because Miami-Dade is not a party nor has it sought to intervene in this case.

advisory opinion from the Division of Elections, requesting an interpretation of the deadline set forth in sections 102.111 and 102.112. The Division of Elections responded by issuing Advisory Opinion DE 00-10, stating that absent unforeseen circumstances, returns from the county must be received by 5 p.m. on the seventh day following the election in order to be included in the certification of the statewide results.

Relying upon this advisory opinion, the Florida Secretary of State (the Secretary) issued a statement on Monday, November 13, 2000, that she would ignore returns of the manual recounts received by the Florida Department of State (the Department) after Tuesday, November 14, 2000, at 5:00 p.m. The Volusia County Canvassing Board (the Volusia Board) on Monday, November 13, 2000, filed suit in the Circuit Court of the Second Judicial Circuit in Leon County, Florida, seeking declaratory and injunctive relief, and the candidates and the Palm Beach County Canvassing Board (the Palm Beach Board), among others, were allowed to intervene. In its suit, the Volusia Board sought a declaratory judgment that it was not bound by the November 14, 2000, deadline and also sought an injunction barring the Secretary from ignoring election returns submitted by the Volusia Board after that date.

The trial court ruled on Tuesday, November 14, 2000, that the deadline was mandatory but that the Volusia Board may amend its returns at a later date and that the Secretary, after "considering all attendant facts and circumstances," may exercise her discretion in determining whether to ignore the amended returns.[4] Later

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[4]The trial court's order reads in part:

> The County Canvassing Boards are, indeed, mandated to certify and file their returns with the Secretary of State by 5:00 p.m. today, November 14, 2000. There is nothing, however, to prevent the County Canvassing Boards from filing with the Secretary of State further returns after completing a manual recount. It is then up to the Secretary of

that day, the Volusia Board filed a notice of appeal of this ruling to the First District Court of Appeal, and the Palm Beach Board filed a notice of joinder in the appeal.

Subsequent to the circuit court's order, the Secretary announced that she was in receipt of certified returns (i.e., the returns resulting from the initial recount) from all counties in the State. The Secretary then instructed Florida's Supervisors of Elections (Supervisors) that they must submit to her by 2 p.m., Wednesday, November 15, 2000, a written statement of "the facts and circumstances" justifying any belief on their part that they should be allowed to amend the certified returns previously filed. Four counties submitted their statements on time. After considering the reasons in light of specific criteria,[5] the Secretary on Wednesday, November 15,

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> state, as the Chief Election Officer, to determine whether any such corrective or supplemental returns filed after 5:00 p.m. today, are to be ignored. Just as the County Canvassing Boards have the authority to exercise discretion in determining whether a manual recount should be done, the Secretary of State has the authority to exercise her discretion in reviewing that decision, considering all attendant facts and circumstances, and decide whether to include or to ignore the late filed returns in certifying the election results and declaring the winner.
>
> Just as the Secretary cannot decide ahead of time what late returns should or should not be ignored, it would not be proper for me to do so by injunction. I can lawfully direct the Secretary to properly exercise her discretion in making a decision on the returns, but I cannot enjoin the Secretary to make a particular decision, nor can I rewrite the Statute which, by its plain meaning, mandates the filing of returns by the Canvassing Boards by 5:00 p.m. on November 14, 2000.

McDermott v. Harris, No. 00-2700, unpublished order at 7 (Fla. 2d Cir. Ct. Nov. 14, 2000).

[5]The criteria considered by the Secretary are as follows:

> Facts & Circumstances Warranting Waiver of Statutory Deadline

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1. Where there is proof of voter fraud that affects the outcome of the election. *In re Protest of Election Returns*, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. *McDermott v. Harris*, No. 00-2700 (Fla. 2d Cir. Ct. Nov. 14, 2000).

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. *Beckstrom. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("[M]ere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.").

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Letter from Katherine Harris to Palm Beach County Canvassing Board (Nov. 15, 2000).

2000, rejected the reasons and again announced that she would not accept the amended returns but rather would rely on the earlier certified totals for the four counties. The Secretary further stated that after she received the certified returns of the overseas absentee ballots from each county, she would certify the results of the presidential election on Saturday, November 18, 2000.

On Thursday, November 16, 2000, the Florida Democratic Party and Albert Gore filed a motion in Circuit Court of the Second Judicial Circuit in Leon County, Florida, seeking to compel the Secretary to accept amended returns. After conducting a hearing, the court denied relief in a brief order dated Friday, November 17, 2000.[6] That day, both the Democratic Party and Gore appealed to the First District Court of Appeal, which consolidated the appeals with the Volusia Board's appeal already pending there, and certified both of the underlying trial court orders to this Court based on the Court's "pass-through" jurisdiction.[7] By orders dated Friday, November 17, 2000, this Court accepted jurisdiction, set an expedited briefing schedule, and enjoined the Secretary and the Elections Canvassing Commission

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[6]The court's order reads in part:

> On the limited evidence presented, it appears that the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision. My order requires nothing more.

McDermott v. Harris, No. 00-2700, unpublished order at 2 (Fla. 2d Cir. Ct. Nov. 17, 2000).

[7]*See* Art. V, § 3(b)(5), Fla. Const. ("[The Court may] review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance . . . and certified to require immediate resolution by the supreme court.").

(Commission) from certifying the results of the presidential election until further order of this Court.[8]

II. GUIDING PRINCIPLES

Twenty-five years ago, this Court commented that the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases:

> [T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interest to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. *The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard.* We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

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[8]Subsequently, the Volusia Board moved to voluntarily dismiss its appeal in this Court. The Court granted the motion, but indicated that the case style would remain the same and that Gore and the Palm Beach Board "would continue as intervenors/appellants in this action."

Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975) (emphasis added). We consistently have adhered to the principle that the will of the people is the paramount consideration.[9] Our goal today remains the same as it was a quarter of a century ago, i.e., to reach the result that reflects the will of the voters, whatever that might be. This fundamental principle, and our traditional rules of statutory construction, guide our decision today.

III. ISSUES

The questions before this Court include the following: Under what circumstances may a Board authorize a countywide manual recount pursuant to section 102.166(5); must the Secretary and Commission accept such recounts when the returns are certified and submitted by the Board after the seven day deadline set forth in sections 102.111 and 102.112?[10]

IV. LEGAL OPINION OF THE DIVISION OF ELECTIONS

The first issue this Court must resolve is whether a County Board may conduct a countywide manual recount where it determines there is an error in vote tabulation that could affect the outcome of the election. Here, the Division issued opinion DE 00-13, which construed the language "error in vote tabulation" to exclude the situation where a discrepancy between the original

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[9] *See State ex rel. Chappell v. Martinez*, 536 So. 2d 1007, 1009 (Fla. 1988) (holding that disenfranchisement of voters is not proper where there has been substantial compliance with the election statute and the intent of voter can be ascertained); *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 726 (Fla. 1998) (holding that courts should not frustrate will of voters if that will can be determined).

[10] Neither party has raised as an issue on appeal the constitutionality of Florida's election laws.

machine return and sample manual recount is due to the manner in which a ballot has been marked or punched.

Florida courts generally will defer to an agency's interpretation of statutes and rules the agency is charged with implementing and enforcing.[11] Florida courts, however, will not defer to an agency's opinion that is contrary to law.[12] We conclude that the Division's advisory opinion regarding vote tabulation is contrary to law because it contravenes the plain meaning of section 102.166(5).

Pursuant to section 102.166(4)(a), a candidate who appears on a ballot, a political committee that supports or opposes an issue that appears on a ballot, or a political party whose candidate's name appeared on the ballot may file a written request with the County Board for a manual recount. This request must be filed with the Board before the Board certifies the election results or within seventy-two hours after the election, whichever occurs later.[13] Upon filing the written request for a manual recount, the canvassing board may authorize a manual recount.[14] The decision whether to conduct a manual recount is vested in the sound discretion of the Board.[15] If the canvassing board decides to authorize the manual recount, the recount must include at least three precincts and at least one percent of the total votes cast for each candidate or issue, with the person who requested the

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[11] *See Donato v. American Tel. & Tel. Co.*, 767 So. 2d 1146, 1153 (Fla. 2000); *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st DCA 1994).

[12] *See Donato*, 767 So. 2d at 1153; *Nikolits v. Nicosia*, 682 So. 2d 663, 666 (Fla. 4th DCA 1996).

[13] § 102.166(4)(b), Fla. Stat. (2000).

[14] § 102.166(4)(c), Fla. Stat. (2000).

[15] *See Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

recount choosing the precincts to be recounted.[16] If the manual recount indicates an "error in the vote tabulation which could affect the outcome of the election," the county canvassing board "shall":

> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; *or*
>
> (c) Manually recount all ballots.

§ 102.166(5)(a)-(c), Fla. Stat. (2000) (emphasis added).

The issue in dispute here is the meaning of the phrase "error in the vote tabulation" found in section 102.166(5). The Division opines that an "error in the vote tabulation" only means a counting error resulting from incorrect election parameters or an error in the vote tabulating software. We disagree.

The plain language of section 102.166(5) refers to an error in the vote tabulation rather than the vote tabulation system. On its face, the statute does not include any words of limitation; rather, it provides a remedy for any type of mistake made in tabulating ballots. The Legislature has utilized the phrase "vote tabulation system" and "automatic tabulating equipment" in section 102.166 when it intended to refer to the voting system rather than the vote count. Equating "vote tabulation" with "vote tabulation system" obliterates the distinction created in section 102.166 by the Legislature.

Sections 101.5614(5) and (6) also support the proposition that the "error in vote tabulation" encompasses more than a mere determination of whether the vote tabulation system is functioning. Section 101.5614(5) provides that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board."

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[16] *See* § 102.166(4)(d), Fla. Stat. (2000).

Conversely, section 101.5614(6) provides that any vote in which the Board cannot discern the intent of the voter must be discarded. Taken together, these sections suggest that "error in the vote tabulation" includes errors in the failure of the voting machinery to read a ballot and not simply errors resulting from the voting machinery.

Moreover, section 102.141(4), which outlines the Board's responsibility in the event of a recount, states that the Board "shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot and determine whether the returns correctly reflect the votes cast." § 102.141, Fla. Stat. (2000) (emphasis added). Therefore, an "error in the vote tabulation" includes a discrepancy between the number of votes determined by a voter tabulation system and the number of voters determined by a manual count of a sampling of precincts pursuant to section 102.166(4).

Although error cannot be completely eliminated in any tabulation of the ballots, our society has not yet gone so far as to place blind faith in machines. In almost all endeavors, including elections, humans routinely correct the errors of machines. For this very reason Florida law provides a human check on both the malfunction of tabulation equipment and error in failing to accurately count the ballots. Thus, we find that the Division's opinion DE 00-13 regarding the ability of county canvassing boards to authorize a manual recount is contrary to the plain language of the statute.

Having concluded that the county canvassing boards have the authority to order countywide manual recounts, we must now determine whether the Commission[17] must

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[17]The Commission is composed of the Secretary of State, the Director of the Division of Elections, and the Governor. *See* § 102.111, Fla. Stat. In this instance, Florida Governor Jeb Bush has removed himself from the Commission because his brother, Texas Governor George W. Bush, is the Republican candidate for Presi-

accept a return after the seven-day deadline set forth in sections 102.111 and 102.112 under the circumstances presented.

V. THE APPLICABLE LAW

The abiding principle governing all election law in Florida is set forth in article I, section 1, Florida Constitution:

> SECTION 1. Political power.–All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

Art. I, § 1, Fla. Const. The constitution further provides that elections shall be regulated by law:

> SECTION 1. Regulation of elections.–All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. *Registration and elections shall, and political party functions may, be regulated by law*; however, the requirements for a candidate with no party affiliation or for a candidate of a minor party for placement of the candidate's name on the ballot shall be no greater than the requirements for a candidate of the party having the largest number of registered voters.

Art. VI, § 1, Fla. Const. (emphasis added).

The Florida Election Code ("Code"), contained in chapters 97–106, Florida Statutes (2000), sets forth specific criteria regulating elections. The Florida Secretary of State is the chief election officer of the state and is

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dent of the United States. Robert Crawford, Florida Commissioner on Agriculture, has been appointed to replace Florida Governor Jeb Bush. *See* § 102.111, Fla. Stat.

charged with general oversight of the election system.[18] The Supervisor of Elections ("Supervisor") in each county is an elected official[19] and is charged with appointing two Election Boards for each precinct within the county prior to an election.[20] Each Election Board is composed of inspectors and clerks,[21] all of whom must be residents of the county,[22] and is charged with conducting the voting in the election, counting the votes,[23] and certifying the results to the Supervisor[24] by noon of the day following the election.[25] The County Canvassing Board ("Canvassing Board" or "Board"), which is composed of the Supervisor, a county court judge, and the chair of the board of county commissioners,[26] then canvasses the returns countywide,[27] reviews the certificates,[28] and transmits the returns for state and federal officers to the Florida Department of State ("Department") by 5:00 p.m. of the seventh day following the election.[29] No deadline is set for filing corrected, amended, or supplemental returns.

The Elections Canvassing Commission ("Canvassing Commission" or "Commission"), which is composed of the Governor, the Secretary of State, and the Director

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[18] § 97.012, Fla. Stat. (2000).

[19] § 98.015, Fla. Stat. (2000).

[20] § 102.012(1), Fla. Stat. (2000).

[21] § 102.012(1), Fla. Stat. (2000).

[22] § 102.012(2), Fla. Stat. (2000).

[23] § 102.012(4), Fla. Stat. (2000).

[24] § 102.071, Fla. Stat. (2000).

[25] § 102.141(3), Fla. Stat. (2000).

[26] § 102.141(1), Fla. Stat. (2000).

[27] § 102.141(2), Fla. Stat. (2000).

[28] § 102.141 (3), Fla. Stat. (2000).

[29] §§ 102.111–.112, Fla. Stat. (2000).

of the Division of Elections, canvasses the returns statewide, determines and declares who has been elected for each office, and issues a certificate of election for each office as soon as the results are compiled.[30] If any returns appear to be irregular or false and the Commission is unable to determine the true vote for a particular office, the Commission certifies that fact and does not include those returns in its canvass.[31] In determining the true vote, the Commission has no authority to look beyond the county's returns.[32] A candidate or elector can "protest" the returns of an election as being erroneous by filing a protest with the appropriate County Canvassing Board.[33] And finally, a candidate, elector, or taxpayer can "contest" the certification of election results by filing a post-certification action in circuit court within certain time limits[34] and setting forth specific grounds.[35]

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[30] §§ 102.111, .121, Fla. Stat. (2000).

[31] § 102.131, Fla. Stat. (2000) ("If any returns shall appear to be irregular or false so that the Elections Canvassing Commission is unable to determine the true vote for any office . . . the commission shall so certify and shall not include the returns in its determination, canvass, and declaration.").

[32] § 102.131, Fla. Stat. (2000) ("The Elections Canvassing Commission in determining the true vote shall not have authority to look beyond the county returns.").

[33] § 102.166, Fla. Stat. (2000).

[34] *See* § 102.168(2), Fla. Stat. (2000) (explaining that the action must be filed within ten days after the last Board certifies its returns or within five days after the last Board certifies its returns following a protest).

[35] The grounds for contesting an election are set forth in section 102.168(3), Florida Statutes (2000):

> (a) Misconduct, fraud, or corruption . . . sufficient to change or place in doubt the result of the election.
>
> (b) Ineligibility of the successful candidate . . . .

VI. STATUTORY AMBIGUITY

The provisions of the Code are ambiguous in two significant areas. First, the time frame for conducting a manual recount under section 102.166(4) is in conflict with the time frame for submitting county returns under sections 102.111 and 102.112. Second, the mandatory language in section 102.111 conflicts with the permissive language in 102.112.

A. The Recount Conflict

Section 102.166(1) states that "[a]ny candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn written protest." The time period for filing a protest is "prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever occurs later."

Section 102.166(4)(a), the operative subsection in this case, further provides that, in addition to any protest, "any candidate whose name appeared on the ballot. . . or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount" accompanied by the "reason that the manual recount is being requested." Section 102.166(4)(b) further pro-

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(c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(d) Proof that any elector, election official or canvassing board member was given or offered a bribe . . . .

(e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question.

vides that the written request may be made prior to the time the Board certifies the returns or within seventy-two hours after the election, whichever occurs later:[36]

> (4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.
>
> *(b) Such request must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after*

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[36] As discussed in *Siegel v. Lepore*, 2000 WL 1687185 *6 (S.D. Fla. 2000):

> On its face, the manual recount provision does not limit candidates access to the ballot or interfere with voters' right to associate or vote. Instead the manual recount provision is intended to safeguard the integrity and reliability of the electoral process by providing a structural means of detecting and correcting clerical or electronic tabulating errors in the counting of election ballots. While discretionary in its application, the provision is not wholly standardless. Rather, the central purpose of the scheme, as evidenced by its plain language, is to remedy 'an error in the vote tabulation which could affect the outcome of the election.' Fla. Stat. §102.166(5). In this pursuit, the provision strives to strengthen rather than dilute the right to vote by securing, as nearly as humanly possible, an accurate and true reflection of the will of the electorate. Notably, the four county canvassing boards [that were] challenged in this suit have reported various anomalies in the initial automated count and recount. The state manual recount provision therefore serves important governmental interests.

midnight of the date the election was held, whichever occurs later.

§ 102.166, Fla. Stat. (2000) (emphasis added).

A Board "may" authorize a manual recount[37] and such a recount must include at least three precincts and at least one percent of the total votes cast for the candidate.[38] The following procedure then applies:

> (5) If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:
>
> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.
>
> (6) Any manual recount shall be open to the public.
>
> (7) Procedures for a manual recount are as follows:
>
> (a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.
>
> (b) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall

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[37]The statute does not set forth any criteria for determining when a manual recount is appropriate. *See* § 102.166(4)(c), Fla. Stat. (2000) ("The county canvassing board may authorize a manual recount.").

[38]§ 102.166(4)(d), Fla. Stat. (2000).

be presented to the county canvassing board for it to determine the voter's intent.

§ 102.166, Fla. Stat. (2000).

Under this scheme, a candidate can request a manual recount at any point prior to certification by the Board and such action can lead to a full recount of all the votes in the county. Although the Code sets no specific deadline by which a manual recount must be completed, logic dictates that the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days. The protest provision thus conflicts with section 102.111 and 102.112, which state that the Boards "must" submit their returns to the Elections Canvassing Commission by 5:00 p.m. of the seventh day following the election or face penalties. For instance, if a party files a pre-certification protest on the sixth day following the election and requests a manual recount and the initial manual recount indicates that a full countywide recount is necessary, the recount procedure in most cases could not be completed by the deadline in sections 102.111 and 102.112, i.e., by 5:00 p.m. of the seventh day following the election.

B. The "Shall" and "May" Conflict

In addition to the conflict in the above statutes, sections 102.111 and 102.112 contain a dichotomy. Section 102.111, which sets forth general criteria governing the State Canvassing Commission, was enacted in 1951 as part of the Code and provides as follows:

102.111 Elections Canvassing Commission.–

(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections

> shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. *If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored,* and the results shown by the returns on file shall be certified.

§ 102.111, Fla. Stat. (2000) (emphasis added).

The Legislature in 1989 revised chapter 102 to include section 102.112, which provides that returns not received after a certain date "may" be ignored and that members of the County Board "shall" be fined:

> 102.112 Deadline for submission of county returns to the Department of State; penalties.–
>
> (1) The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after the certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. *If the returns are not received by the department by the time specified, such returns may be ignored* and the results on file at that time may be certified by the department.
>
> (2) The department shall fine each board member $200 for each day such returns are late, the fine to be paid only from the board member's

> personal funds. Such fines shall be deposited into the Election Campaign Financing Trust fund, created by s. 106.32.
>
> (3) Members of the county canvassing board may appeal such fines to the Florida Elections Commission, which shall adopt rules for such appeals.

§ 102.112, Fla. Stat. (2000) (emphasis added).

The above statutes conflict. Whereas section 102.111 is mandatory, section 102.112 is permissive. While it is clear that the Boards must submit returns by 5 p.m. of the seventh day following the election or face penalties, the circumstances under which penalties may be assessed are unclear.

VII. LEGISLATIVE INTENT

Legislative intent–as always–is the polestar that guides a court's inquiry into the provisions of the Florida Election Code.[39] Where the language of the Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code.[40] As noted above, however, chapter 102 is unclear concerning both the time limits for submitting the results of a manual recount and the penalties that may be assessed by the Secretary. In light of this ambiguity, the Court must resort to traditional rules of statutory construction in an effort to determine legislative intent.[41]

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[39] *See, e.g., Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Admin. Hearings*, 686 So. 2d 1349 (Fla. 1997).

[40] *See, e.g., Starr Tyme, Inc. v. Cohen*, 659 So. 2d 1064 (Fla. 1995).

[41] *See, e.g., Capers v. State*, 678 So. 2d 330 (Fla. 1996).

First, it is well-settled that where two statutory provisions are in conflict, the specific statute controls the general statute.[42] In the present case, whereas section 102.111 in its title and text addresses the general makeup and duties of the Elections Canvassing Commission, the statute only tangentially addresses the penalty for returns filed after the statutory date, noting that such returns "shall" be ignored by the Department. Section 102.112, on the other hand, directly addresses in its title and text both the "deadline" for submitting returns and the "penalties" for submitting returns after a certain date; the statute expressly states that such returns "may" be ignored and that dilatory Board members "shall" be fined. Based on the precision of the title and text, section 102.112 constitutes a specific penalty statute that defines both the deadline for filing returns and the penalties for filing returns thereafter and section 102.111 constitutes a non-specific statute in this regard. The specific statute controls the non-specific statute.

Second, it also is well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute.[43] In the present case, the provision in section 102.111 stating that the Department "shall" ignore returns was enacted in 1951 as part of the Code. On the other hand, the penalty provision in section 102.112 stating that the Department "may" ignore returns was enacted in 1989 as a revision to chapter 102. The more recently enacted provision may be viewed as the clearest and most recent expression of legislative intent.

Third, a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision.[44] In the present case, section

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[42] *See, e.g., State ex rel. Johnson v. Vizzini*, 227 So. 2d 205 (Fla. 1969).

[43] *See, e.g., McKendry v. State*, 641 So. 2d 45 (Fla. 1994).

[44] *See, e.g., Amente v. Newman*, 653 So. 2d 1030 (Fla. 1995).

102.112 contains a detailed provision authorizing the assessment of fines against members of a dilatory County Canvassing Board. The fines are personal and substantial, i.e., $200 for each day the returns are not received. If, as the Secretary asserts, the Department were required to ignore all returns received after the statutory date, the fine provision would be meaningless. For example, if a Board simply completed its count late and if the returns were going to be ignored in any event, what would be the point in submitting the returns? The Board would simply file no returns and avoid the fines. But, on the other hand, if the returns submitted after the statutory date would not be ignored, the Board would have good reason to submit the returns and accept the fines. The fines thus serve as an alternative penalty and are applicable only if the Department may count the returns.

Fourth, related statutory provisions must be read as a cohesive whole.[45] As stated in *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992), "all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with another." In this regard we consider the provisions of section 102.166 and 102.168.

Section 102.166 states that a candidate, political committee, or political party may request a manual recount any time before the County Canvassing Board certifies the results to the Department and, if the initial manual recount indicates a significant error, the Board "shall" conduct a countywide manual recount in certain cases. Thus, if a protest is filed on the sixth day following an election and a full manual recount is required, the Board, through no fault of its own, will be unable to submit its returns to the Department by 5:00 p.m. on the

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[45] *See, e.g., Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735 (Fla. 1961).

seventh day following the election. In such a case, if the mandatory provision in section 102.111 were given effect, the votes of the county would be ignored for the simple reason that the Board was following the dictates of a different section of the Code. The Legislature could not have intended to penalize County Canvassing Boards for following the dictates of the Code.

And finally, when the Legislature enacted the Code in 1951, it envisioned that all votes cast during a particular election, including absentee ballots, would be submitted to the Department at one time and would be treated in a uniform fashion. Section 97.012(1) states that it is the Secretary's responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Chapter 101 provides that all votes, including absentee ballots, must be received by the Supervisor no later than 7 p.m. on the day of the election. Section 101.68(2)(d) expressly states that "[t]he votes on absentee ballots shall be included in the total vote of the county." Chapter 102 requires that the Board submit the returns by 5 p.m. on the seventh day following the election.

The Legislature thus envisioned that when returns are submitted to the Department, the returns "shall" embrace all the votes in the county, including absentee ballots. This, of course, is not possible because our state statutory scheme has been superseded by federal law governing overseas voters;[46] overseas ballots must be counted if received no later than ten days following the election (i.e., the ballots do *not* have to be received by 7 p.m. of the day of the election, as provided by state law).[47] In light of the fact that overseas ballots cannot be

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[46]According to the Secretary, this matter is governed by consent decree with the federal government.

[47]*See* Fla. Admin. Code R.1S-2.013 (1998), which provides in relevant part:

counted until after the seven day deadline has expired, the mandatory language in section 102.111 has been supplanted by the permissive language of section 102.112.

Further, although county returns must be received by 5 p.m. on the seventh day following an election, the "official results" that are to be compiled in order to certify the returns and declare who has been elected must be construed in pari materia with section 101.5614(8), which specifies that "write-in, absentee *and manually counted results* shall constitute the official return of the election." (Emphasis added.)

Under this statutory scheme, the County Canvassing Boards are required to submit their returns to the Department by 5 p.m. of the seventh day following the election. The statutes make no provision for exceptions following a manual recount. If a Board fails to meet the deadline, the Secretary is not required to ignore the county's returns but rather is permitted to ignore the returns within the parameters of this statutory scheme. To determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount , it is necessary to examine the interplay between our statutory and constitutional law at both the state and federal levels.

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(7) With respect to the presidential preference primary and the general election, any absentee ballot cast for a federal office by an overseas elector which is postmarked or signed and dated no later than the date of the Federal election shall be counted if received no later than 10 days from the date of the Federal election so long as such absentee ballot is otherwise proper. Overseas electors shall be informed by the supervisors of elections of the provisions of this rule, i.e., the ten day extension provision for the presidential preference primary and the general election, and the provision for voting for the second primary.

VIII. THE RIGHT TO VOTE

The text of our Florida Constitution begins with a Declaration of Rights, a series of rights so basic that the founders accorded them a place of special privilege.[48] The Court long ago noted the venerable role the Declaration plays in our tripartite system of government in Florida:

> It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying certain things that it may do. These Declarations of Rights . . . have cost much, and breathe the spirit of that sturdy and self-reliant philosophy of individualism which underlies and supports our entire system of government. No race of hothouse plants could ever have produced and compelled the recognition of such a stalwart set of basic principles, and no such race can preserve them. They say to arbitrary and autocratic power, from whatever official quarter it may advance to invade these vital rights of personal liberty and private property, "Thus far shalt thou come, but no farther."

State v. City of Stuart, 120 So. 335, 347 (Fla. 1929). Courts must attend with special vigilance whenever the Declaration of Rights is in issue.

The right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished. The importance of this right was acknowledged by the authors of the Constitution, who placed it first in the Declaration. The very first words in the body of the constitution are as follows:

> SECTION 1. Political power.–*All political power is inherent in the people*. The enuncia-

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[48] *Traylor v. State*, 596 So. 2d 957, 963 (Fla. 1992).

> tion herein of certain rights shall not be construed to deny or impair others retained by the people.

Art. I., § 1, Fla. Const. (emphasis added). The framers thus began the constitution with a declaration that all political power inheres in the people and only they, the people, may decide how and when that power may be given up.[49]

To the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no "unreasonable or unnecessary" restraints on the right of suffrage:

> The declaration of rights expressly states that "all political power is inherent in the people." Article I, Section 1, Florida Constitution. The right of the people to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable [restraints on that right]. . . . *Unreasonable or unnecessary* restraints on the elective process are prohibited.

Treiman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977) (emphasis added).[50] Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizéns' right to vote:

> Generally, the courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters and the intention of the voters should prevail when counting ballots . . . . It is the in-

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[49] *See* Talbot D'Alemberte, *Commentary*, 25A Fla. Stat. Ann., Art. I, § 1, Fla. Const. (West 1991).

[50] *See also Pasco v. Heggen*, 314 So. 2d 1, 3 (Fla. 1975) ("We have also stated that only unreasonable or unnecessary restraints on the elective process are prohibited.").

> tention of the law to obtain an honest expression of the will or desire of the voter.

State ex rel. Carpenter v. Barber, 198 So. 49, 51 (Fla. 1940).[51] Courts must not lose sight of the fundamental purpose of election laws: The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy.[52] Technical statutory requirements must not be exalted over the substance of this right.[53]

Based on the foregoing, we conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances as we set forth in this opinion. The clear import of the penalty provision of section 102.112 is to deter Boards from engaging in dilatory conduct contrary to statutory authority that results in the late certification of a county's returns. This deterrent purpose is achieved by the fines in section 102.112, which are substantial and personal and are levied on each member of a Board. The alternative penalty, i.e., ignoring the county's returns, punishes not the Board members themselves but rather the county's electors, for it in effect disenfranchises them.[54]

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[51] *See also State ex rel. Whitley v. Rinehart*, 192 So. 819, 823 (Fla. 1939) ("Election laws should be construed liberally in favor of the right to vote . . . .").

[52] *See, e.g., State ex rel. Landis v. Dyer*, 148 So. 201, 203 (Fla. 1933) ("The right to vote, though not inherent, is a constitutional right in this state. The Legislature may impose reasonable rules and regulations for its governance, but it cannot under the guise of such regulation unduly subvest or restrain this right.").

[53] *See, e.g., Boardman v. Esteva*, 323 So. 2d 259, 269 (Fla. 1975) ("In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected.").

[54] *Cf. Boardman v. Esteva*, 323 So. 2d 259, 268-69 (Fla. 1975) ("When the voters have done all that the statute has required them

Ignoring the county's returns is a drastic measure and is appropriate only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process.[55] In either case, the Secretary must explain to the Board her reason for ignoring the returns and her action must be adequately supported by the law. To disenfranchise electors in an effort to deter Board members, as the Secretary in the present case proposes, is unreasonable, unnecessary, and violates longstanding law.

Allowing the manual recounts to proceed in an expeditious manner, rather than imposing an arbitrary seven-day deadline, is consistent not only with the statutory scheme but with prior United States Supreme Court pronouncements:

> Indiana has found, along with many other States, that one procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount. Despite the fact that a certificate of election may be issued to the leading candidate within 30 days after the election, the results are not final if a candidate's option to compel a recount is exercised. A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, s 4.

Roudebush v. Hartke, 405 U.S. 15, 25 (1972)(footnotes omitted).

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to do, they will not be disfranchised [sic] solely on the basis of the failure of the election officials to observe directory statutory instructions.").

[55] *See* 3 U.S.C. §§ 1-10 (1994).

In addition, an accurate vote count is one of the essential foundations of our democracy. The words of the Supreme Court of Illinois are particularly apt in this case:

> The purpose of our election laws is to obtain a correct expression of the intent of the voters. Our courts have repeatedly held that, where the intention of the voter can be ascertained with reasonable certainty from his ballot, that intention will be given effect even though the ballot is not strictly in conformity with the law. . . . The legislature authorized the use of electronic tabulating equipment to expedite the tabulating process and to eliminate the possibility of human error in the counting process, not to create a technical obstruction which defeats the rights of qualified voters. This court should not, under the appearance of enforcing the election laws, defeat the very object which those law are intended to achieve. To invalidate a ballot which clearly reflects the voter's intent, simply because a machine cannot read it, would subordinate substance to form and promote the means at the expense of the end.
>
> The voters here did everything which the Election Code requires when they punched the appropriate chad with the stylus. These voters should not be disfranchised where their intent may be ascertained with reasonable certainty, simply because the chad they punched did not completely dislodge from the ballot. Such a failure may be attributable to the fault of the election authorities, for failing to provide properly perforated paper, or it may be the result of the voter's disability or inadvertence. Whatever the reason, where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect.

Pullen v. Milligan, 561 N.E.2d 585, 611 (Ill. 1990) (citations omitted).

IX. THE PRESENT CASE

The trial court below properly concluded that the County Canvassing Boards are required to submit their returns to the Department by 5:00 p.m. of the seventh day following the election and that the Department is not required to ignore the amended returns but rather may count them. The court, however, erred in holding that the Secretary acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts. The Secretary's rationale for rejecting the Board's returns was as follows:

> The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Palm Beach County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. The Board has alleged the *possibility* that the results of the manual recount *could* affect the outcome of the election if certain results obtain. However, absent an assertion that there has been substantial noncompliance with the law, I do not believe that the *possibility* of affecting the outcome of the election is enough to justify ignoring the statutory deadline. Furthermore, I find that the facts and circumstances alleged, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statu-

> tory deadline imposed by the Florida Legislature.

Letter from Katherine Harris to Palm Beach Canvassing Board (Nov. 15, 2000) (emphasis added).

We conclude that, consistent with the Florida election scheme, the Secretary may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process. The Secretary in the present case has made no claim that either of these conditions apply at this point in time.

The above analysis is consistent with *State ex rel. Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988), wherein the Court addressed a comparable recount issue. There, the total votes cast for each of two candidates for a seat in the United State House of Representatives were separated by less than one-half of one percent; the county conducted a mandatory recount; the Board's certification of results was not received by the Department until two days after the deadline, although the Board had telephoned the results to the Department prior to the deadline; and the unsuccessful candidate sued to prevent the Department from counting the late votes. The Court concluded that the will of the electors supersedes any technical statutory requirements:

> [T]he electorate's effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election. "There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, then who can be heard to complain the statute has not been literally and absolutely complied with?"

Chappell, 536 So. 2d at 1008-09 (quoting *Boardman v. Esteva*, 323 So. 2d 259, 267 (Fla. 1975)).

X. CONCLUSION

According to the legislative intent evinced in the Florida Election Code, the permissive language of section 102.112 supersedes the mandatory language of section 102.111. The statutory fines set forth in section 102.112 offer strong incentive to County Canvassing Boards to submit their returns in a timely fashion. However, when a Board certifies its returns after the seven-day period because the Board is acting in conformity with other provisions of the Code or with administrative rules or for other good cause, the Secretary may impose no fines. It is unlikely that the Legislature would have intended to punish a Board for complying with the dictates of the Code or some other law.

Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited. The Secretary may ignore such returns only if their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either such case, this drastic penalty must be both reasonable and necessary. But to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, misses the constitutional mark. The constitution eschews punishment by proxy.

As explained above, the Florida Election Code must be construed as a whole. Section 102.166 governs manual recounts and appears to conflict with sections 102.111 and 102.112, which set a seven day deadline by

which County Boards must submit their returns. Further, section 102.111, which provides that the Secretary "shall" ignore late returns, conflicts with section 102.112, which provides that the Secretary "may" ignore late returns. In the present case, we have used traditional rules of statutory construction to resolve these ambiguities to the extent necessary to address the issues presented here. We decline to rule more expansively, for to do so would result in this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it -- the Legislature.

Because of the unique circumstances and extraordinary importance of the present case, wherein the Florida Attorney General and the Florida Secretary of State have issued conflicting advisory opinions concerning the propriety of conducting manual recounts, and because of our reluctance to rewrite the Florida Election Code, we conclude that we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here.[56]

Accordingly, in order to allow maximum time for contests pursuant to section 102.168, amended certifications must be filed with the Elections Canvassing Commission by 5 p.m. on Sunday, November 26, 2000 and the Secretary of State and the Elections Canvassing Commission shall accept any such amended certifications received by 5 p.m. on Sunday, November 26, 2000, provided that the office of the Secretary of State, Division of Elections is open in order to allow receipt thereof. If the office is not open for this special purpose on Sunday, November 26, 2000, then any amended certifications shall be accepted until 9 a.m. on Monday, November 27, 2000. The stay order entered on Novem-

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[56] At oral argument, we inquired as to whether the presidential candidates were interested in our consideration of a reopening of the opportunity to request recounts in any additional counties. Neither candidate requested such an opportunity.

ber 17, 2000, by this Court shall remain in effect until the expiration of the time for accepting amended certifications set forth in this opinion. The certificates made and signed by the Elections Canvassing Commission pursuant to section 102.121 shall include the amended returns accepted through the dates set forth in this opinion.

It is so ordered. No motion for rehearing will be allowed.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

* * * * *

APPENDIX E

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2431

ALBERT GORE, JR., Nominee of the Democratic Party of the United States for President of the United States, *et al.*,

Appellants,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE STATE OF FLORIDA, *et al.*,

Appellees.

CLARIFICATION OF ARGUMENT FOR APPELLEES GEORGE W. BUSH AND DICK CHENEY

[Dec. 7, 2000]

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POINTS OF CLARIFICATION

I. This Court Cannot Grant the Relief Requested

In response to Chief Justice Wells' questions at oral argument, Respondent George W. Bush hereby clarifies his position on this Court's jurisdiction over this challenge to the certification of the presidential election and electors. Under *McPherson v. Blacker*, 146 U.S. 1 (1892), the Supreme Court made explicit that Article II authorizes the states to appoint electors only in "such Manner as the Legislature thereof may direct" and thus the federal Constitution "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power" of the State. U.S. Slip Op. at 5 (quoting *McPherson*, 146 U.S. at 25).[1]

Regardless of whether the Florida Election Code allows for some form of an appeal from a contest in these circumstances, it is absolutely clear under Florida and federal law that this Court does not have authority to grant the *relief* sought by Appellants. Appellants ask this Court to: 1) completely substitute itself for both the county canvassing boards and the state canvassing commission; 2) engage in a selective recount of certain ballots in a few Florida counties; 3) adopt an unprecedented "standard" for divining voter intent; and 4) declare the results of a statewide election of federal electors based upon this selective recount. This Court does

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[1] In particular, as the Supreme Court also made clear in *McPherson*, "[t]his power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions . . . ." 146 U.S. at 34 (quoting Senate Rep. 1st Sess., 432 Cong. No. 395). Notwithstanding the preexisting Florida Rules of Appellate Procedure allowing appellate review of Circuit Court judgments generally, it is plain that, as Appellants plead this case, *this* case is before this Court jurisdictionally only by virtue of Article V, Section 3(b)(5) of the Florida Constitution.

not have authority to grant such relief under Florida law or federal law.

Moreover, doing so would clearly constitute a change in the manner in which Florida selected its electors, thus violating both the Federal Constitution and federal statute. This "judicially selected" slate of Presidential electors would not be validly chosen and, unlike the presently certified slate of electors, their votes would not be "conclusive" under 3 U.S.C. § 5 and the judicial mandate would be contrary to *McPherson v. Blacker*.

If, as Vice President Gore contends, this Court may conduct a *de novo* review of ballots, without deferring either to the manual recount decisions of county canvassing boards (such as Palm Beach) or to certified election results (such as the manually recounted votes certified in Volusia and Broward Counties), it must conduct a *de novo* review of the 176 votes counted by Palm Beach, *as well as* all manually recounted votes in Volusia and Broward. The Court plainly cannot erect a dual standard of deferring to canvassing boards when it *helps* Vice President Gore (for the 176 "votes" in Palm Beach and the 567 additional "votes" in Broward), but engage in *de novo* review of manual recount decisions challenged by Vice President Gore (*e.g.* the ballots rejected in Palm Beach and in Dade counties). Moreover, since a determination of who received the "highest number of votes" throughout the state is the only basis for determining which presidential candidate won and may be certified, the Court must also count *every* vote not registered by a machine.[2]

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[2]In addition to common sense, the plain language of 103.111 mandates this rule because it requires certification of the "candidates for President and Vice President who received the *highest number of votes*." Consequently, the Court cannot order or undo a certification unless it *knows* who received the highest number of votes – which it cannot do if that question is in doubt.

Additionally, for the first time in their brief to this Court, Appellants make the remarkable assertion that this Court should exercise *original* jurisdiction in this matter. They then ask the Court to engage in its own selective recount of certain ballots, declare a winner to the statewide Presidential election on this basis, nullify a previously certified result and actually direct the Secretary of State to "'certify as elected the presidential electors of' Al Gore and Joe Lieberman, under Section 113.011." Such a course of conduct would clearly violate the United States Constitution and federal statutes,[3] and, just as clearly, it is not authorized by Florida law. Since, as the Vice President acknowledges, this All Writs power is derived from "Article V of the Florida *Constitution*," the Court would violate Article II of the federal Constitution by exercising a power not given it by the Florida legislature. Mandamus or other equitable

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[3]Moreover, this Court is barred as a matter of federal law from "nullifying" a certification of an election by executive officials in the State of Florida or choosing its own set of judicially designated electors. After certification of an election pursuant to Florida law, which has now occurred, the manner of voting and the validity of the votes of Presidential electors is governed by federal law. Pursuant to 3 U.S.C. § 6, it is "the duty of the executive of each State" to communicate the selection of a slate of presidential electors to the Archivist of the United States. Under 3 U.S.C. § 15 it is *only* the votes of presidential electors "whose appointment has been lawfully certified according to section 6 of this title" that are deemed conclusive in the face of congressional challenge. Moreover, if two slates of electors are presented from any State and a dispute ensues between the two Houses of Congress, "the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, *shall be counted*." 3 U.S.C. § 15 (emphasis added). Thus, appointing a competing judicially-selected slate of Gore electors is not an available form of relief as a matter of federal law. It would result in a contest in Congress, which 3 U.S.C. §§ 6 and 15 make clear would be won by the electors certified by the executive pursuant to the election itself – in this case the 25 Bush electors certified on November 26, 2000.

relief cannot lie because, as this Court has frequently noted, "the original and appellate jurisdiction of the Courts of Florida is derived entirely from article V of the Florida Constitution, *not* by the Florida legislature." *Allen v. Butterworth*, 756 So. 2d 52, 63 (Fla. 2000). *See also, Dresner v. City of Tallahassee*, 134 So. 2d 228, 229 (Fla. 1961) ("This Court derives its appellate jurisdiction from article V, Florida Constitution.").

Ultimately, it is not the Florida Constitution nor is it the view of other State Supreme Courts that control the disposition of this matter. Nor is this matter amenable to resolution by resort to this Court's equitable powers, derived from the State Constitution or otherwise, to alter Florida's laws in effect as of Election Day. Nor can this matter be definitively resolved under any Florida case-law that was not decided under the modern Florida election code. Instead, it is the Florida Election Code, as enacted by the Florida Legislature pursuant to Article II of the U.S. Constitution–and that alone–that controls this case, and the relief that can be granted.

II. Under the Florida Election Code, Section 102.168 Does Not Apply to Presidential Elections, and to Apply it now Would Violate Article II of the U.S. Constitution, *McPherson v. Blacker*, and 3 U.S.C. § 5.

In addition to the question whether this Court has statutory jurisdiction over this appeal, there is no basis or precedent in Florida law for applying the ultimate judgment of a successful Section 102.168 contest proceeding at all to a presidential election. Indeed, by its terms, the Section 102.168 remedy does not apply to presidential elections.

This issue was recently addressed by the Circuit Court in its Order of November 20, 2000 in *Fladell v. The Elections Canvassing Comm'n of the State of Fla.*,

(15th Judicial Circuit).[4] The court, after an extensive analysis of the Legislature's intent in drafting Sections 102.168 and 103.011, held that Section 102.168 was *not* intended to apply to Presidential elections. *See id.* at 10-15.

The *Fladell* court noted that the provisions for certifying the election of presidential electors are set forth elsewhere in the Florida Statutes: "The Legislature of the State of Florida, pursuant to the authority granted by Congress, enacted §103.011, Florida Statutes, in an effort to codify the procedure or mechanics for conducting elections for Presidential electors." *Fladell*, slip op. at 6. The Court further noted that Section 103.011, entitled "Electors of President and Vice President," makes *no* provision for a "contest" of the Presidential election. The Court concluded from this omission that the Florida Legislature did *not* intend for Section 102.168 to apply to Presidential elections.[5] *Id.* at 15. Rather, the Court held, "[a] review of the statutes that immediately follow §102.168 point to the conclusion that §102.168 was intended to apply to elected officers *other than the Presidency.*" *Id.* at 9, n.3 (emphasis added).

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[4]On December 1, 2000, the Florida Supreme Court concluded that rulings by the *Fladell* Court on this issue were unnecessary and affirmed on other grounds. *See Fladell v. Palm Bch. County Canvassing Bd.*, Nos. SC00-2372 & SC00-2376, at 4 (Fla. Dec. 1, 2000).

[5]Various provisions of Chapter 103 provide means by which presidential electors can be replaced. For example, when an elector is "unable to serve because of death, incapacity or *otherwise* ... the Governor may appoint a person to fill such vacancy ..." §103.021(5), Fla. Stat. (2000) (emphasis added). Similarly, if an elector is absent from the meeting of electors, the remaining electors can vote to appoint a replacement. §103.061, Fla. Stat. (2000). However, while Florida law provides these mechanisms for replacing "presidential electors" after the election is certified, it does *not* provide for any "contest" of that election.

As the *Fladell* Court compellingly observed, "[s]urely, this Court is without authority to enter a judgment of 'ouster' against the President and Vice President of the United States." Slip op. at 9, n.3.

Simply put, then, this is an action by the wrong parties, seeking relief under the wrong statute, brought against the wrong defendants. And for this Court, or any Florida Court, to now extend Florida statutes to reach it, would run afoul of Article II of the U.S. Constitution, *McPhereson v. Blacker*, and 3 U.S.C. § 5.

* * * * *

APPENDIX F

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2431

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, *et al.*,

Appellants,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE STATE OF FLORIDA, *et al.*,

Appellees.

AMENDED BRIEF OF APPELLEES GEORGE W. BUSH AND DICK CHENEY

[Dec. 6, 2000]

From the Second Judicial Circuit Court,
in and for Leon County,

Lower Tribunal No. 00-2808

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* * * * *

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And *Fifth*, the Circuit Court noted that any post-election change in applicable standards for counting ballots – such as any newfound "dimple" standard, contrary to

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Palm Beach County's pre-existing standard – could constitute a change in law under 3 U.S.C. § 5 and therefore endanger Florida's electors. And, if ballots in one county were reviewed under a standard different than that applied in other counties, significant disparities could arise among in the impact of individual votes creating a situation that would violate federal constitutional standards.

* * * * *

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D. A Statewide Contest Would Require Statewide Recount.

In a contest of a statewide election, a statewide recount is required by the Equal Protection Clause of the U.S. Constitution and Florida Statute Section 102.168.

* * * * *

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II. THERE ARE FEDERAL CONSTITUTIONAL AND STATUTORY CONSIDERATIONS THAT APPLY TO THIS CASE AND THAT REQUIRE AFFIRMATION OF THE CIRCUIT COURT'S DECISION.

The Circuit Court found as a factual matter that the standard of vote counting in Palm Beach County that existed on November 7, 2000 was that embodied in a written 1990 guideline: that indentations or dimples will not count as votes. The court further noted that any change in that standard may, in turn, be contrary to 3 U.S.C. § 5. Indeed, for a court in a contest proceeding to now apply a standard that counts dimples as votes in selective counties would be directly contrary to 3 U.S.C. § 5, and it would also violate Article II, Section I of the U.S. Constitution. In addition, a change in the deadline for certification for election returns, along with a change in the time period for contesting an election, would likewise violate Article II, Section 1 of the U.S. Constitution and 3 U.S.C. § 5. Finally, the application of counting standards in different counties as well as the

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occurrence of manual recounts in only selected counties or selective portions of counties violates the equal protection and due process clauses of the U.S. Constitution. As Florida's Attorney General recently opined, "[a]s the State's chief legal officer, I feel a duty to warn that [if] the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official Canvassing Boards, the State will incur a legal jeopardy under both the United States and the state constitutions." Findings at 12.

* * * * *

APPENDIX G

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA CIVIL DIVISION

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, et. al.,

Plaintiffs,

v. CASE NO. 00-2808

KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, et. al.,

v.

BROWARD COUNTY CANVASSING BOARD, et. al.,

Third-Party Defendants.

_____/

[Dec. 2, 2000]

THIRD PARTY COMPLAINT OF DEFENDANTS GEORGE W. BUSH AND DICK CHENEY

* * * * *

[Page 4]

15. When it began the countywide recount on November 15, the Broward County Canvassing Board adopted a test under which chads with at least two corners separated ("hanging" and "swinging door" chads)

were counted, but "pregnant" chads (bulges but all corners attached) and "dimpled" chads (indentation but all corners attached) were not counted. At a hearing, Canvassing Board Chairman Lee stated that "unlike Dade . . . which adopted what they called an evolving case-by-case basis standard and Palm Beach which had the flip-flop standard, we adopted an objective standard . . . and we did it at the advice of the County Attorney, so that no one could say later we were trying to guess back and forth was this a vote, was it not a vote."

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16. On Friday, November 17, Democratic Party representatives filed suit in Broward County Circuit Court seeking a ruling that "pregnant" or "dimpled" chads also must be counted as votes. The Court did not grant their request.

17. On Saturday, November 18, Chairman Lee stated that the Broward County Canvassing Board would not change its procedure until a court clarified the standard for what constitutes a vote. However, on Sunday, November 19, Andrew J. Meyers, an attorney from the County Attorney's Office, appeared before the Board for the first time and argued that the two-corner rule was "impermissibly narrow" and that the Board needed to "determine the clear intent of each ballot whenever that intent can be determined."

18. By November 21, 2000, the Broward County Canvassing Board had completed a manual recount of 544 of the total 609 precincts. It was reported that based on that partial recount, the Democratic Presidential Electors gained a net of only 117 votes. Subsequently, after 604 of 609 precincts had been recounted, it was reported that the Democratic Presidential Electors had gained a net of 127 votes.

19. On Wednesday, November 22, 2000, all 609 precincts had been recounted, and it was reported that the Democratic Presidential Electors had a net gain of 137 votes.

20. During the manual recount, the Board had set aside a stack of ballots showing "undervotes." The Board intended to examine each of those ballots after

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the recount process was completed to establish voter intent, although no specific standard for ascertaining voter intent had been set, unless the Supreme Court ordered otherwise.

21. On Wednesday, November 22, the Board still had not established clear standards for evaluating the ballots set aside for further review.

22. On Thursday, November 23, and Friday, November 24, the Board used conflicting and malleable standards in evaluating the contested "dimple" ballots. The Board applied various arbitrary tests depending on the ballot; whether light shone through (the "sunshine" test), the "depth" of the dimple, whether other chads on the ballot had holes or dimples, and which party the voter appeared to favor.

23. In developing its tests, the Board purportedly relied on the *Pullen v. Mulligan* case cited by the Florida Supreme Court in its November 22 ruling in *Palm Beach Canvassing Board v. Harris*, even though the *Pullen* case did not involve "dimples."

24. The Democratic Presidential Electors' net gain grew to 369 after a counting session in which each member of the Canvassing Board employed a different standard for ascertaining voter intent.

25. Board member Gunzberger frequently applied the "light standard," inquiring whether light shone through the ballot.

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26. Board member Rosenberg counted ballots as to which there was "reasonable certainty" of voter intent. In implementing his standard, Rosenberg considered

whether there was a pattern of dimples or other dimples on a ballot. According to Rosenberg, a pattern of dimples on a ballot evidenced a voter's intent to vote. However, if there were punctured chads for candidates in other races, a dimpled chad did not demonstrate with reasonable certainty a voter's intent to vote.

27. Board member Lee admitted he divined voter intent by looking to see if the ballot was voted for Democrats in other races and, if so, inferred that the particular voter must have intended to vote for the Democratic Presidential Electors.

28. Board member Gunzberger acted arbitrarily and capriciously with the deliberate intent of maximizing votes for the Democratic Presidential Electors and minimizing votes for the Republican Presidential Electors. She manipulated and bent the ballots to try to see light. She considered dimpled ballots as votes for the Democratic Presidential Electors, but did not consider identical or similar ballots as votes for the Republican Presidential Electors. She was assisted by her personal attorney who was present during the counting. Their communications regarding her decisions about a voter's intent were not held publicly, in violation of the Florida Sunshine Law.

29. Broward County Canvassing Board members Lee and Gunzberger treated dimpled overvotes differently than dimpled undervotes. They ruled that a differently than dimpled undervotes. They ruled that a

[Page 8]

ballot containing a dimpled chad for one candidate and a punched chad for another candidate was not an overvote. This practice resulted in an inflated number of votes for the Democratic Presidential Electors.

30. The Broward County Canvassing Board improperly failed to reject ballots that included votes for more than one nominee for President of the United States. Republican recount observers reported that

overvotes were counted for the Democratic Presidential Electors.

31. The Broward County Canvassing Board conducted its manual recount employing a standard for determining voter intent that was inappropriate under Section 101.5614(5), (6) of the Florida Statutes. Some members of the Board improperly counted as votes indications and marks on a ballot that could not indicate an intent to vote.

32. The Broward County Canvassing Board followed a different standard for counting ballots than did the Palm Beach County Canvassing Board.

33. The Broward County manual recount was marked by irregularities and abuse, including, but not limited to, the following:

a. Ballot manipulation, tampering and degradation: Workers manipulated, rubbed their fingers across, and bent ballots, causing chads to fall out and making voter intent impossible to determine. Observers further reported that some ballots counted for the Democratic Presidential Electors showed ink marks and creases.

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Another counter manipulated a chad to make it more "pregnant." Another counter pounded a table with the ballots, causing a chad to fall out. County worker Evan Kolodny told workers they could push chads off the table, pick them up and keep them.

b. Abuse of discretion: Counters and county officials refused requests by observers for sufficient time to review the counts and for resolution of count disparities. On Sunday, November 19, the Board ejected a Republican observer for "excessive" challenges, and the observer was removed by a sheriff.

c. Inadequate security of ballots: Ballots were left unattended during lunch breaks, and recount observers reported that chads appeared on a table after a lunch break. After inquiry by observers, county workers replied that they knew "it's not a presidential chad."

d. Bias: Democratic party volunteers who were not county workers worked as counters counting ballots. County workers openly cheered for Gore. County workers encouraged Democratic observers to challenge Bush votes and told Republican observers not to challenge ballots.

e. Count disparities: Republican observers reported noting different counts for the Republican and Democratic Electors than recorded by county workers and reported observing inappropriate efforts to

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include votes that had been cast for the Republican Presidential Electors in the stack of ballots counted for the Democratic Presidential Electors. At least one such instance was broadcast live on network television as it occurred.

f. Fatigue: County workers showed signs of fatigue, which further calls into question the accuracy of the count.

34. The Broward County Canvassing Board finished manually recounting all ballots on November 25, 2000.

35. On November 26, 2000, the Broward County Canvassing Board certified new results to the Elections Canvassing Commission.

36. Plaintiffs Gore and Lieberman filed suit in Leon County Circuit Court to contest the elections results from Palm Beach, Miami-Dade, and Nassau Counties, but not Broward County.

37. The number of votes improperly counted as votes for the Democratic Presidential Electors through the Broward County Canvassing Board's illegal procedures greatly exceeds, by at least 200, the number of votes allegedly counted improperly as votes for the Republican Presidential Electors through these same procedures.

38. The changes the Broward County Canvassing Boar made to the policies and procedures that it historically had followed in connection with manual recounts violated the Due Process Clause of the Fourteenth Amendment and 3

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U.S.C. § 5, which requires that a state resolve controversies relating to the election of electors under "laws enacted prior to" election day.

39. If the Court grants Plaintiffs' request to recount ballots in Miami-Dade and Palm Beach Counties, then it must also order a recount of the ballots in Broward County.

40. If any ballots are recounted as a result of Plaintiffs' Complaint, the illegal votes counted in Broward County under the new rules established after the election should be excluded under the Due Process Clause and 3 U.S.C. § 5.

* * * * *

APPENDIX H

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA CIVIL DIVISION

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, and JOSEPH I. LIEBERMAN, Nominee of the Democratic Party of the United States for the Vice President of the United States,

Plaintiffs,

v. CASE NO: 00-2808

KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, and SECRETARY OF AGRICULTURE BOB CRAWFORD, SECRETARY OF STATE KATHERINE HARRIS AND L. CLAYTON ROBERTS, DIRECTOR, DIVISION OF ELECTIONS, Individually and as members of and as THE FLORIDA ELECTIONS CANVASSING COMMISSION,

And

THE MIAMI-DADE COUNTY CANVASSING BOARD, LAWRENCE D. KING, MYRIAM LEHR and DAVID C. LEAHY as members of and as THE MIAMI-DADE COUNTY CANVASSING BOARD, and DAVID C. LEAHY, individually and as Supervisor of Elections,

And

THE NASSAU COUNTY CANVASSING BOARD, ROBERT E. WILLIAMS, SHIRLEY N. KING, and DAVID HOWARD (or, in the alternative, MARIANNE P. MARSHALL), as members of and as the NASSAU COUNTY CANVASSING BOARD, and SHIRLEY N. KING, individually and as Supervisor of Elections,

And

THE PALM BEACH COUNTY CANVASSING BOARD, THERESA LEPORE, CHARLES E. BURTON, and CAROL ROBERTS, as members of and as the PALM BEACH COUNTY CANVASSING BOARD, and THERESA LEPORE, individually and as Supervisor of Elections,

And

GEORGE W. BUSH, Nominee of the Republican Party of the United States for President of the United States and RICHARD CHENEY, Nominee of the Republican Party of the United States for Vice President of the United States,

Defendants.

_____/

[Nov. 30, 2000]

ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANTS GEORGE W. BUSH AND RICHARD CHENEY TO COMPLAINT TO CONTEST ELECTION

* * * * *

[Page 13]

9. Plaintiffs' request that this Court count the votes cast by voters in two selected counties differently from those cast by voters in the remaining 65 counties would violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution and the Equal Protection and Due Process Clauses of the Florida Constitution. To the extent that Plaintiffs are allowed to introduce evidence of selective manual recounts of ballots in Miami-Dade and Palm Beach Counties, all ballots cast in those two counties and Nassau must be counted, as well as all the ballots in several other counties where Defendants Bush and Cheney

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have identified the counting of illegal votes and the exclusion of legal votes, including Broward, Volusia and Pinellas Counties.

10. The judicial limitations established by the Florida courts after the election regarding the discretion of state executive officials to certify election results and the standards applied to resolve controversies concerning the election of presidential electors, violate the Due Process Clause of the Fourteenth Amendment and 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day. The new judicial rules imposed upon the state executive officials after the election reduced the margin of victory for the Republican Presidential Electors. Because Plaintiffs' Complaint is based on law, limitations and standards newly established only after the election, Plaintiffs are not entitled to the relief requested, and the Complaint should be dismissed with prejudice.

* * * * *

[Page 15]

13. During its manual recount after the election, the Broward County Canvassing Board changed the established policies and procedures that it had historically followed in connection with manual recounts, including the counting of "dimpled" ballots. That alteration of election laws after the election violates the Due Process Clause of the Fourteenth Amendment and 3 U.S.C. § 5, which requires that a state resolve controversies relating to the election of electors under "laws enacted prior to" election day. The constantly changing rules adopted by the Broward County Canvassing Board after the election illegally reduced the margin of victory for the Republican Presidential Electors. If any ballots are recounted as a result of the Complaint, the illegal votes counted in Broward County under the new rules established after the election should be excluded under the Due Process Clause and 3 U.S.C. § 5.

14. At all relevant times, the Broward County Canvassing Board during its manual recount conducted prior to November 26, 2000 employed an inappropriate

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standard to determine the clear intent of the voter under Section 101.5614(5) of the Florida Statutes. In particular, the Broward County Canvassing Board used a wholly subjective and partisan standard when examining the ballots and failed to examine each ballot as a whole under the totality of the circumstances. In doing so, the Board counted "indented" chads when the ballot as a whole did not demonstrate the clear intent of the voter. If any ballots are recounted as a result of the Complaint, the illegal votes counted in Broward County under the rules altered after the election should be excluded under Section 102.168(3)(c).

15. Prior to this election, the County Canvassing Boards in Miami-Dade and Palm Beach Counties never counted "dimpled" chads as legal votes. Therefore, the counting of "dimpled" chads as votes in this election, as Plaintiffs request, would violate the Due Process Clause of the Fourteenth Amendment and 3 U.S.C. § 5, which requires that a state resolve controversies relating to the election of electors under "laws enacted prior to" election day.

APPENDIX I

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA CIVIL DIVISION

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, and JOSEPH I. LIEBERMAN, Nominee of the Democratic Party of the United States for the Vice President of the United States,

Plaintiffs,

v. CASE NO. 00-2808

KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, and SECRETARY OF AGRICULTURE BOB CRAWFORD, SECRETARY OF STATE KATHERINE HARRIS AND L. CLAYTON ROBERTS, DIRECTOR, DIVISION OF ELECTIONS, Individually and as members of and as THE FLORIDA ELECTIONS CANVASSING COMMISSION,

And

THE MIAMI-DADE COUNTY CANVASSING BOARD, LAWRENCE D. KING, MYRIAM LEHR and DAVID C. LEAHY as members of and as THE MIAMI-DADE COUNTY CANVASSING BOARD, and DAVID C. LEAHY, individually and as Supervisor of Elections,

And

THE NASSAU COUNTY CANVASSING BOARD, ROBERT E. WILLIAMS, SHIRLEY N. KING, and DAVID HOWARD (or, in the alternative, MARIANNE P. MARSHALL), as members of and as the NASSAU COUNTY CANVASSING BOARD, and SHIRLEY N. KING, individually and as Supervisor of Elections,

And

THE PALM BEACH COUNTY CANVASSING BOARD, THERESA LEPORE, CHARLES E. BURTON, and CAROL ROBERTS, as members of and as the PALM BEACH COUNTY CANVASSING BOARD, and THERESA LEPORE, individually and as Supervisor of Elections,

And

GEORGE W. BUSH, Nominee of the Republican Party of the United States for President of the United States and RICHARD CHENEY, Nominee of the Republican Party of the United States for Vice President of the United States,

Defendants.

_____/

[Nov. 30, 2000]

MOTION AND MEMORANDUM IN SUPPORT OF DEFENDANTS GEORGE W. BUSH AND DICK CHENEY'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, FAILURE TO NAME INDISPENSABLE PARTIES, AND FAILURE TO STATE A CLAIM

* * * * *

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The Court made this ruling ([b]ecause of the unique circumstances and extraordinary importance of the present case..." *Id.* (slip op. at 39). The unique circumstance at issue is 3 U.S.C. § 5, which requires appointment of electors by December 12. The Court was mindful that this Federal law mandated results by a date certain when it noted the "interplay between our statutory and constitutional law at both the state and federal levels." *Id.* (slip op. at 29). To comply with the Federal electoral process, the Supreme Court of Florida decided that it could not permit manual recounts under Section 102.166 to stretch on indefinitely, and it imposed a deadline. Therefore, a county canvassing board that acts in compliance with the Supreme Court of Florida's deadline for manual recounts, a deadline based on the

preeminent position of Federal law in this particular matter, cannot be found to be in violation of a mandatory statutory act when its recount would violate that deadline.

* * * * *

[Page 44]

. . . (2) a full statewide or substantial recount is the only way to determine the present election contest and conducting such an election contest within the time constraints imposed by 3 U.S.C. § 5 is impossible;

* * * * *

APPENDIX J

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Article II, § 1, cl. 2

Presidential Electors.

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

* * * * *

Article II, § 1, cl. 4

Presidential Electors.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

* * * * *

Amendment XII

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots

the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

* * * * *

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

3 U.S.C. 1

§ 1. Time of appointing electors

The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

3 U.S.C. 2

§ 2. Failure to make choice on prescribed day

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

* * * * *

3 U.S.C. 5

§ 5. Determination of controversy as to appointment of electors

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of

such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. 6

§ 6. Credentials of electors; transmission to Archivist of the United States and to Congress; public inspection

It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvas or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title [3 U.S.C. § 7] to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made;

and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.

* * * * *

3 U.S.C. 15

§ 15. Counting electoral votes in Congress

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate

shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when the agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper pur-

porting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

* * * * *

THE CONSTITUTION OF THE STATE OF FLORIDA

ARTICLE V—JUDICIARY

* * * * *

§ 3 Supreme court.

(a) Organization.--The supreme court shall consist of seven justices. Of the seven justices, each appellate district shall have at least one justice elected or appointed from the district to the supreme court who is a resident of the district at the time of the original appointment or election. Five justices shall constitute a quorum. The concurrence of four justices shall be necessary to a decision. When recusals for cause would prohibit the court from convening because of the requirements of this section, judges assigned to temporary duty may be substituted for justices.

(b) Jurisdiction.--The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

(8) May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

(10) Shall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

(c) Clerk and marshal.--The supreme court shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court directs. Their compensation shall be fixed by general law. The marshal shall have the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

FLORIDA STATUTES

TITLE 9—ELECTORS AND ELECTIONS

CHAPTER 97—QUALIFICATION AND REGISTRATION OF ELECTORS

* * * * *

97.012 Secretary of State as Chief Election Officer

The Secretary of State is the chief election officer of the state, and it is his or her responsibility to:

(1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.

* * * * *

FLORIDA STATUTES

TITLE 9—ELECTORS AND ELECTIONS

CHAPTER 102—CONDUCTING ELECTIONS AND ASCERTAINING THE RESULTS

* * * * *

102.111 Elections Canvassing Commission.

(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. If the county returns are not received by the Department of State by 5 p.m. of the

seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.

(2) The Division of Elections shall provide the staff services required by the Elections Canvassing Commission.

102.112 Deadline for submission of county returns to the Department of State; penalties.

(1) The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.

(2) The department shall fine each board member $200 for each day such returns are late, the fine to be paid only from the board member's personal funds. Such fines shall be deposited into the[1] Election Campaign Financing Trust Fund, created by § 106.32.

(3) Members of the county canvassing board may appeal such fines to the Florida Elections Commission, which shall adopt rules for such appeals.

* * * * *

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[1] The trust fund expired, effective November 4, 1996, by operation of § 19(f), Art. III of the State Constitution.

102.141 County canvassing board; duties.

* * * * *

(4) If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office, that a candidate for retention to a judicial office was retained or not retained by one-half of a percent or less of the votes cast on the question of retention, or that a measure appearing on the ballot was approved or rejected by one-half of a percent or less of the votes cast on such measure, the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure. A recount need not be ordered with respect to the returns for any office, however, if the candidate or candidates defeated or eliminated from contention for such office by one-half of a percent or less of the votes cast for such office request in writing that a recount not be made. Each canvassing board responsible for conducting a recount shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot and determine whether the returns correctly reflect the votes cast. If there is a discrepancy between the returns and the counters of the machines or the tabulation of the ballots cast, the counters of such machines or the tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly.

* * * * *

102.166 Protest of election returns; procedure.

(1) Any candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy, shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn, written protest.

(2) Such protest shall be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever occurs later.

(3) Before canvassing the returns of the election, the canvassing board shall:

(a) When paper ballots are used, examine the tabulation of the paper ballots cast.

(b) When voting machines are used, examine the counters on the machines of nonprinter machines or the printer-pac on printer machines. If there is a discrepancy between the returns and the counters of the machines or the printer-pac, the counters of such machines or the printer-pac shall be presumed correct.

(c) When electronic or electromechanical equipment is used, the canvassing board shall examine precinct records and election returns. If there is a clerical error, such error shall be corrected by the county canvassing board. If there is a discrepancy which could affect the outcome of an election, the canvassing board may recount the ballots on the automatic tabulating equipment.

(4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

(b) Such request must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours

after midnight of the date the election was held, whichever occurs later.

(c) The county canvassing board may authorize a manual recount. If a manual recount is authorized, the county canvassing board shall make a reasonable effort to notify each candidate whose race is being recounted of the time and place of such recount.

(d) The manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue. In the event there are less than three precincts involved in the election, all precincts shall be counted. The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts.

(5) If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:

(a) Correct the error and recount the remaining precincts with the vote tabulation system;

(b) Request the Department of State to verify the tabulation software; or

(c) Manually recount all ballots.

(6) Any manual recount shall be open to the public.

(7) Procedures for a manual recount are as follows:

(a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.

(b) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

(8) If the county canvassing board determines the need to verify the tabulation software, the county canvassing board shall request in writing that the Department of State verify the software.

(9) When the Department of State verifies such software, the department shall:

(a) Compare the software used to tabulate the votes with the software filed with the Department of State pursuant to § 101.5607; and

(b) Check the election parameters.

(10) The Department of State shall respond to the county canvassing board within 3 working days.

* * * * *

102.168 Contest of election.

(1) Except as provided in § 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.

(2) Such contestant shall file a complaint, together with the fees prescribed in chapter 28, with the clerk of the circuit court within 10 days after midnight of the date the last county canvassing board empowered to

canvass the returns certifies the results of that particular election following a protest pursuant to § 102.166(1), whichever occurs later.

(3) The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election on a submitted referendum. The grounds for contesting an election under this section are:

(a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.

(b) Ineligibility of the successful candidate for the nomination or office in dispute.

(c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.

(e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board.

(4) The canvassing board or election board shall be the proper party defendant, and the successful candidate shall be an indispensable party to any action brought to contest the election or nomination of a candidate.

(5) A statement of the grounds of contest may not be rejected, nor the proceedings dismissed, by the court for any want of form if the grounds of contest provided in the statement are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.

(6) A copy of the complaint shall be served upon the defendant and any other person named therein in the same manner as in other civil cases under the laws of this state. Within 10 days after the complaint has been served, the defendant must file an answer admitting or denying the allegations on which the contestant relies or stating that the defendant has no knowledge or information concerning the allegations, which shall be deemed a denial of the allegations, and must state any other defenses, in law or fact, on which the defendant relies. If an answer is not filed within the time prescribed, the defendant may not be granted a hearing in court to assert any claim or objection that is required by this subsection to be stated in an answer.

(7) Any candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing. However, the court in its discretion may limit the time to be consumed in taking testimony, with a view therein to the circumstances of the matter and to the proximity of any succeeding primary or other election.

(8) The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

* * * * *

FLORIDA STATUTES
TITLE 9—ELECTORS AND ELECTIONS
CHAPTER 106—CAMPAIGN FINANCING

* * * * *

106.23 Powers of the Division of Elections.

(1) In order to carry out the responsibilities prescribed by § 106.22, the Division of Elections is empowered to subpoena and bring before its duly authorized representatives any person in the state, or any person doing business in the state, or any person who has filed or is required to have filed any application, document, papers, or other information with an office or agency of this state or a political subdivision thereof and to require the production of any papers, books, or other records relevant to any investigation, including the records and accounts of any bank or trust company doing business in this state. Duly authorized representatives of the division are empowered to administer all oaths and affirmations in the manner prescribed by law to witnesses who shall appear before them concerning any relevant matter. Should any witness fail to respond to the lawful subpoena of the division or, having responded, fail to answer all lawful inquiries or to turn over evidence that has been subpoenaed, the division may file a complaint before any circuit court of the state setting up such failure on the part of the witness. On the filing of such complaint, the court shall take jurisdiction of the witness and the subject matter of said complaint and shall direct the witness to respond to all lawful questions and to produce all documentary evidence in the witness's possession which is lawfully demanded. The failure of any witness to comply with such order of the court shall constitute a direct and criminal contempt of court, and the court shall punish said witness accordingly. However, the refusal by a witness to answer inquiries or turn over evidence on the basis that such testimony or material will tend to incriminate such witness

shall not be deemed refusal to comply with the provisions of this chapter.

(2) The Division of Elections shall provide advisory opinions when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor, candidate, local officer having election-related duties, political party, committee, person, or organization has taken or proposes to take. A written record of all such opinions issued by the division, sequentially numbered, dated, and indexed by subject matter, shall be retained. A copy shall be sent to said person or organization upon request. Any such person or organization, acting in good faith upon such an advisory opinion, shall not be subject to any criminal penalty provided for in this chapter. The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought, unless material facts were omitted or misstated in the request for the advisory opinion.

Dec 10, 2000 (1)

No. 00-949

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
Petitioners,

v.

ALBERT GORE, JR., ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR RESPONDENT JOHN E. THRASHER IN SUPPORT OF PETITIONERS

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IN THE

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On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR RESPONDENT JOHN E. THRASHER IN SUPPORT OF PETITIONERS

SUMMARY OF ARGUMENT

The Florida Supreme Court's actions stand in direct violation of this Court's Order in *George W. Bush v. Palm Beach County Canvassing Board*, dated December 4, 2000, which "vacated" the Supreme Court of Florida's November 21, 2000 decision. First, the Florida Supreme Court disobeyed this Court's Order by continuing to regard its vacated decision as binding precedent. In the case under review, the Florida Supreme Court reversed the lower court, in part, for failing to follow the Florida Supreme Court's vacated decision. Second, the Florida Supreme Court violated this Court's remand "for further proceedings not inconsistent with this opinion" by misconstruing Section 102.168, Florida Statutes (2000), to apply to presidential elections.

This violated the express intent of the Florida Legislature, in the exercise of its plenary authority under Article II, Section II, Clause 2 of the United States Constitution. Third, the Florida Supreme Court allowed parties without standing to bring a Section 102.168 contest claim. Finally, assuming Section 102.168 applies to a presidential election, the Florida Supreme Court declined to recognize the successful presidential electors as indispensable parties, in violation of Sections 102.168 (4) and 103.011, Florida Statutes.

John E. Thrasher, a certified presidential elector, intervened and sought dismissal on these grounds in the trial court, also raising these grounds before the Florida Supreme Court. However, the Florida Supreme Court declined, in footnote 7 of its December 8, 2000 opinion, to rule upon these critical, constitutional issues, which were timely raised by Thrasher, allegedly because Bush, a separate party, neglected to timely raise them until too late in the day.

ARGUMENT

I. THE SUPREME COURT OF FLORIDA VIOLATED THIS COURT'S DECISION IN *GEORGE W. BUSH V. PALM BEACH COUNTY CANVASSING BOARD.*

In its December 8, 2000 decision in *Albert Gore, Jr. v. Palm Beach County Canvassing Board,* the Supreme Court of Florida overstepped its authority by violating the United States Constitution, the federal statutes governing presidential electors and this Court's order. This Court, in its December 4, 2000 decision in *George W. Bush v. Palm Beach County Canvassing Board*, vacated the Supreme Court of Florida's November 21, 2000 decision, stating:

> Specifically, we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2. We are also unclear as to the consideration the Florida Court accorded to 3 U.S.C. § 5. The judgment of

> the Supreme Court of Florida is therefore vacated, and the case is remanded for further proceedings *not inconsistent with this opinion.*

George W. Bush v. Palm Beach County Canvassing Board, 2000 WL 1769436, *3 (emphasis added).

Following the entry of this Court's December 4, 2000 Order remanding the case to the Florida Supreme Court, that court elected *not* to conduct further proceedings and *not* to render a further opinion. The decision not to render a further opinion has important legal and practical consequences. On the one hand, it leaves undisturbed the Circuit Court judge's decision in *McDermott v. Harris,* No. 00-2700, unpublished order at 7 (Fla. 2d. Cir. Ct. Nov. 17, 2000) (upholding Secretary Katherine Harris' discretion in declining to certify late returns). On the other hand, all actions taken pursuant to that now vacated decision are without any legal effect, including the manual recounts undertaken at the Florida Supreme Court's direction in Miami-Dade, Broward, and Palm Beach Counties, Florida. Thus, Secretary of State Harris' initial decision under Section 102.112, Florida Statutes (2000), not to accept late returns, remains in full force and effect.

Rather than clarify its vacated decision as directed by this Court, the Florida Supreme Court elected to selectively treat portions of that nullified decision as good law. This is explicitly demonstrated by the Florida Supreme Court's reversal of Judge N. Sanders Sauls' decision not to include the belated Palm Beach County returns. In reversing Judge Sauls, the Florida Supreme Court relied on its vacated holding in *Palm Beach County Canvassing Board v. Harris,* No. 00-2346, 2000 WL 1725434 (Fla. Nov. 21, 2000), which extended the certification deadline to November 26, 2000, and prohibited the Secretary of State from exercising her discretion to decline the filing of late returns, unless it would effectively prevent an election contest or endanger the votes

of the Florida presidential electors. The Florida Supreme Court's reliance on its vacated decision to reverse Judge Sauls is made plain from a reading of the following excerpt:

> The circuit court concluded as to Palm Beach County that there was not any "authority to include any returns submitted past the deadline established by the Florida Supreme Court in this election." This conclusion is erroneous as a matter of law. The deadline of November 26, 2000, at 5 p.m. was established in order to allow maximum time for contests pursuant to section 102.168. The deadline was never intended to prohibit legal votes identified after that date through ongoing manual recounts to be excluded from the statewide official results in the Election Canvassing Commission's certification of the results of a recount of less than all of a county's ballots. In that same decision we held that all returns must be considered unless their filing would effectively prevent an election contest from being conducted or endanger the counting of Florida's electors in the presidential election.

Albert Gore, Jr. v. Katherine Harris, 2000 WL 1800752 (Fla. Dec. 8, 2000).[1]

Moreover, the implicit foundation of the Florida Supreme Court's decision now rests upon unsupported reference to "essential principles" and the "essence of the structure of our democratic society." *Id.* This is nothing more than an end-run attempt around this Court's admonition that state courts not make "ambiguous or obscure adjudications" which fail to account for the direct constitutional grant to the state legis-

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[1] This may well represent the first occasion in the judicial history of the United States that a trial court judge was reversed by a state supreme court, "as a matter of law", for failing to follow a decision vacated by the United States Supreme Court.

latures under Art. II, § 1, cl. 2, of the United States Constitution.[2]

Disregarding this Court's decision in *George W. Bush v. Palm Beach County Canvassing Board*, the Florida Supreme Court has improperly legislated what may amount to a statewide manual recount just days before the safe harbor provision of 3 U.S.C. § 15 requires the meeting of the presidential electors. Florida's electoral vote is now jeopardized by a standardless recount that fails to make, as Chief Justice Wells stated in his dissent, any provision for:

> (1) the qualifications of those who count; (2) what standards are used in the count—are they the same standards for all ballots statewide or a continuation of a county-by-county constitutionally suspect standards; (3) who is to observe the count; (4) how one objects to the count; (5) who is entitled to object to the count; (6) whether a person may object to a count; (7) the possible lack of personnel to conduct the count; (8) the fatigue of the counters; and (9) the effect of the differing intra-county standards.

Albert Gore, Jr. v. Katherine Harris, 2000 WL 1800752 (Wells, C.J., dissenting).

As the Florida Supreme Court ignored this Court's order vacating the Florida Supreme Court's prior opinion, this Court should now reverse and vacate the Florida Supreme Court's opinion requiring a manual recount.

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[2] These ambiguous and obscure adjudications are similar to the Florida Supreme Court's statement that legislative enactments are only valid "if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage", which this Court at minimum disfavored and at worst rejected in its December 4, 2000 opinion. *See id.* at 3.

II. FLORIDA'S SCHEME FOR ELECTING PRESIDENTIAL ELECTORS DOES NOT PERMIT GORE'S ELECTION CONTEST.

As Thrasher argued below in the Florida Supreme Court, Vice President Gore's ("Gore") election contest is an action by the wrong party, seeking relief under the wrong statute, brought against the wrong defendants. Voters in this country do not directly elect the President and Vice-President of the United States. Instead, under Article II, section 1, clause 2 of the United States Constitution, the Florida Legislature has exclusive authority to determine the method and manner of nominating presidential electors for each political party. *See* § 103.021(1), Florida Statutes (2000) (codifying the method and manner by which presidential electors are selected in Florida). Once a slate of presidential electors for each political party has been nominated in accordance with Florida's statutory scheme, each voter of the State of Florida then votes at the general election for one of the political party's slate of presidential electors. *See* § 103.011, Florida Statutes (2000). The slate of presidential electors receiving the plurality of Florida's popular vote then, in turn, vote for the Presidential and Vice-Presidential candidates themselves at a meeting of presidential electors on December 18, 2000. *See id.*

In this case, prior to the election, the Governor of the State of Florida nominated and certified to the Secretary of State competing slates of presidential electors for the Republican Party of Florida and the Florida Democratic Party, as well as other political parties. *See* § 103.021(1), Florida Statutes (2000). The names of the candidates for President and Vice President of the United States were printed on the ballots that were used in the election on November 7, and Florida voters cast their votes for these candidates. *See* § 103.011, Florida Statutes (2000). Under Florida law, however, those votes are clearly "counted as votes for the presidential electors supporting such candidates." § 103.011, Florida Statutes

(2000). Voters in the State of Florida elected the Republican Party's slate of electors on November 7.

The results of the election were certified by each county canvassing board and forwarded to the Department of State. *See* § 102.111, Florida Statutes (2000). The Elections Canvassing Commission thereafter certified the returns of the election. *See id.* The election was first certified on November 15, 2000 and, because of a Supreme Court of Florida ruling, supplemental certifications were permitted through November 26 at 5:00 p.m. The challenged certification in this action took place on November 26, 2000, when the Elections Canvassing Commission certified returns of the November 7 general election. Thereafter, the Governor executed a Certificate of Ascertainment certifying the twenty-five Republican Presidential Electors for the State of Florida. The Certificate of Ascertainment certified that the Republican Presidential Electors received a plurality of the votes in the November 7, 2000 General Election in Florida. On November 27, 2000, the Governor forwarded this Certificate of Ascertainment to the Archivist of United States.[3] The President and Vice President of the United States will ultimately be chosen on January 6, 2000 during a joint session of Congress where the electoral votes of each state will be counted. Once the votes are counted, the result will be delivered to the President of the United States Senate, who will then announce the vote. Under the federal statutes, that announcement is deemed a sufficient declaration of the persons elected President and Vice President of the United States. *See* 3 U.S.C. § 15.

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[3] The execution of the Certificate of Ascertainment is an official action of the executive branch of the State of Florida. This Court can take judicial notice of this official action, as well as the official action of sending the Certificate of Ascertainment to the United States Archivist. *See* 90.202, Florida Statutes (2000) (Florida Evidence Code).

Florida law provides no statutory mechanism for contesting the election of these presidential electors. Instead, Section 102.168, Florida Statutes (2000), applies only to a contest to the election of "any person to office." The presidential electors selected on November 7 do not hold any "office" under Florida law, thereby making Section 102.168 inapplicable to their election on November 7. Moreover, Gore is actually a candidate for President of the United States in an election that will take place when Florida's presidential electors cast their votes on December 18, 2000. As a result, Section 102.168 has no bearing, and cannot be read to apply, to the election for of the President and Vice-President of the United States. Because no other Florida statutory mechanism exists for contesting the election of presidential electors or the election of President and Vice-President, the Florida courts lack authority to enter a judgment of ouster of the President of the United States or any "presidential elector." The ability to remove a sitting President lies exclusively with Congress under Article I, Sections 2 and 3, not with a Florida Circuit Court judge in Leon County, Florida.

Moreover, even if a cause of action does exist under Section 102.168, Gore lacks standing to bring this action. Section 102.168(1), Florida Statutes (2000), grants standing for an election contest only to the "unsuccessful candidate for . . . office," a Florida taxpayer, or an elector qualified to vote in Florida. Gore cannot become "an unsuccessful candidate" until the presidential electors' votes are counted on January 6, 2001, in a joint session of Congress. 3 U.S.C. § 15. As a result, Gore has no standing under the express terms of Section 102.168.

Finally, Section 102.168(4) compels that each "successful candidate" be named as a party defendant. The "successful candidates" in the November 7 election were not Governor George W. Bush and Richard Cheney. To the contrary, the successful candidates, if there are any under the meaning of that statute, are the Republican Party's presidential electors,

one of whom was Thrasher. Accordingly, even if Section 102.168 applies to the election of presidential electors, Gore has failed to join as defendants the twenty-five presidential electors who have been certified pursuant to Section 103.011. For this reason alone, the Court below had no jurisdiction to determine the matter before it.

For these reasons, this Court should find Gore unable to bring the current challenge, based on Section 102.168, Florida Statutes (2000).

III. FLORIDA STATUTES SECTION 102.168 DOES NOT APPLY TO A PRESIDENTIAL ELECTION.

Florida does not recognize any common law right to contest an election. *See McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981); *see also Pearson v. Taylor*, 159 Fla. 775, 776, 32 So. 2d 826, 827 (Fla. 1947); *Harden v. Garrett* , 483 So. 2d 409, 411 (Fla. 1985). To the extent that right exists, it must be expressly granted by the Florida Legislature. *See McPherson*, 397 So. 2d at 668.

The Florida Supreme Court has long recognized that where the language of a statute is "clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction, the statute must be given its plain and obvious meaning." *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998). The Supreme Court of Florida reaffirmed that principle in its recent decision in *Palm Beach County Canvassing Bd. v. Harris*, 2000 WL 1725434 (Fla. Nov. 21, 2000), where the Court held:

> Where the language of the [Florida Election] Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code. Section 102.168 is unambiguous. According to its terms, it does not provide any cause of action to

contest a presidential election, or the election of "presidential electors."

In its Order of November 20, 2000 in *Fladell, et al. v. The Elections Canvassing Comm'n of the State of Fla., et al.*, (15th Judicial Circuit), *affirmed in part and nullified in part, Fladell v. Palm Beach County Canvassing Bd.*, Nos. SC00-2372 and SC00-2376 (Fla. Dec. 1, 2000),[4] the Palm Beach County Circuit Court, after an extensive analysis of the Legislature's intent in drafting Sections 102.168 and 103.011, held that Section 102.168 was not intended to apply to Presidential elections. *See id.* at 10-15. The Florida Supreme Court affirmed the Circuit Court's decision on an alternative legal ground and stated "we conclude that all other issues ruled upon by the trial court were not properly reached, and, therefore, the court's rulings are a nullity." *Fladell v. Palm Beach County Canvassing Bd.*

Subsequently, Thrasher intervened in the instant action in order directly to raise anew the legal argument that the Florida Supreme Court in *Fladell* declined to address regarding the inapplicability of section 102.168 to presidential elections. After the trial court denied Thrasher's motion to dismiss, Bush appealed and Thrasher filed his intervenor brief with the Florida Supreme Court. The Florida Supreme Court again avoided deciding this critical threshold issue claiming in footnote 7 that the argument was inconsistent with Bush's prior positions and belated, because Bush failed to raise the issue until after oral argument on appeal. The majority decision of the Florida Supreme Court curiously omitted to note that the argument had previously been directly presented to it in the *Fladell* appeal and timely raised anew by Thrasher in the instant case. Chief Justice Wells,

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[4] On December 1, 2000, the Florida Supreme Court concluded that pertinent rulings by the *Fladell* court are a nullity. *See Fladell v. Palm Beach County Canvassing Bd.*, Nos. SC00-2372 & SC00-2376, at 4 (Fla. Dec. 1, 2000).

however, in his dissent recognized the importance of these threshold issues:

> [t]he local election officials, state election officials, and the courts have been attempting to resolve the issues of this election with an election code which any objective, frank analysis must conclude never contemplated this circumstance. Only to state a few of the incongruities, the time limits of sections 102.112, 102.166, and 102.168 and 3 U.S.C. §§ 1, 5, and 7 simply do not coordinate in any practical way with a presidential election in Florida in the year 2000. Therefore, section 102.168, Florida Statutes, is inconsistent with the remedy being sought here because it is unclear in a presidential election as to: (1) whether the candidates or the presidential electors should be party to this election contest; (2) what the possible remedy would be: and (3) what standards to apply in counting the ballots statewide.

Gore v. Harris, 2000 WL 1800752 (Wells, C.J., dissenting). Moreover, subject matter jurisdiction cannot be waived.

Although lacking precedential value, the Circuit Court's legal analysis of the Florida Election Code is nonetheless sound. The plaintiffs in *Fladell* sought an injunction against certification of the results of this presidential election. They argued that the election should be declared void and that the winner should be declared in an election contest under Section 102.168 because of alleged irregularities in the form of the ballot used in Palm Beach County. The plaintiffs in *Fladell* thus argued that the contest provision of Section 102.168 provided the alternative means of selecting presidential electors provided by 3 U.S.C. § 2, which allows the Florida Legislature to apply alternative means to select electors where a state "has failed to make a choice on the day prescribed by law."

The Circuit Court in *Fladell* engaged in an extensive and careful analysis of the state and federal procedures for

nominating and electing presidential electors. The court noted that the provisions for certifying the election of presidential electors are set forth elsewhere in the Florida Statutes: "The Legislature of the State of Florida, pursuant to the authority granted by Congress, enacted §103.011, Florida Statutes, in an effort to codify the procedure or mechanics for conducting elections for Presidential electors." *Fladell*, slip op. at 6. The Court further noted that Section 103.011, entitled "Electors of President and Vice President," makes *no* provision for a "contest" of the Presidential election. The Court concluded from this omission that the Florida Legislature did *not* intend for Section 102.168 to apply to Presidential elections. *Id.* at 15. Rather, the Court held, "[a] review of the statutes that immediately follow §102.168 point to the conclusion that §102.168 was intended to apply to elected officers *other than the Presidency.*" *Id.* at 9, n.3 (emphasis added).

The analysis of this issue by the Circuit Court in *Fladell* is compelling. Section 103.011 provides for the certification of the election of "presidential electors." That section, which specifically relates to the election of Presidential electors, does not provide for any contest of the election. Various provisions of Chapter 103 provide means by which presidential electors can be replaced. For example, when an elector is "unable to serve because of death, incapacity or *otherwise* . . . the Governor may appoint a person to fill such vacancy . . ." § 103.021(5), Fla. Stat. (2000) (emphasis added). Similarly, if an elector is absent from the meeting of electors, the remaining electors can vote to appoint a replacement. § 103.061, Fla. Stat. (2000). However, while Florida law provides these mechanisms for replacing "presidential electors" after the election is certified, it does *not* provide for any "contest" of that election.

A plain reading of Section 102.168 further confirms that that section was *not* intended by the Florida Legislature to apply to the contest of a presidential election. *First*, had the

Florida Legislature intended for Section 102.168 to be a means for contesting a presidential election, it would not have provided that the action was available only to contest "the certification of election . . . of any person *to office.*" *See* § 102.168(1), Fla. Stat. Despite the inclusion of the names of Governor Bush and Vice President Gore on the ballot on November 7, the only persons "elected" in connection with the Presidential election on that date were "presidential electors." *See* § 103.031, Fla. Stat. (2000).

It is altogether possible for a candidate for President of the United States to be "successful" in the presidential election in Florida, yet take no office. This is in fact what happened in the 1992 Presidential election, for example, where President Bush received the most votes in the Florida Presidential election, but did not take office because he did not receive the majority of votes cast by the presidential electors. As this example demonstrates, the only "successful" candidates in any Presidential election in Florida are the "presidential electors." It is further clear that "presidential electors" are not "successful candidates" for "office" as that term is used in the Election Code.[5] In light of the "resign to run" law set

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[5] The General Counsel to the Florida House of Representatives stated in a November 30, 2000 letter that a presidential elector is not an office. The General Counsel stated, in pertinent part, as follows:

"The question, therefore arises, as to whether an elector for President and Vice President of the United States is an office. It is my opinion that it does not, because an elector is not an officer of the state."

"Section 99.061, Florida Statutes, requires that any person seeking to qualify for nomination or election to federal, state, or multicounty district office, other than a judicial office...or the office of a school board member must file qualification papers. Electors have not been required to file such papers."

forth in Section 99.012, Florida Statutes, and Article 2, section 5 of the Florida Constitution, the term "office" cannot be interpreted to include the position of "presidential elector." Indeed, if "presidential elector " were an office, then numerous presidential electors proposed by the candidates prior to the November 7 election would have been required to resign from any office they currently held in Florida.[6] *See* Art. II, § 5, Fla. Const.; § 99.012(3)(a), Fla. Stat. (2000) ("No person may qualify as a candidate for more than one public office, whether federal, state, district, county, or municipal, if the terms or any part thereof run concurrently with each other."); *compare* § 102.168(1), Fla. Stat. (2000) (providing that an unsuccessful "candidate for such office" may file a contest).

Second, had the Florida Legislature intended for Section 102.168 to be a means for contesting a Presidential election, it would not have identified the "unsuccessful candidate" as a proper plaintiff or required that the "successful candidate" be named as an indispensable party. *See* §§ 102.168(1), (4), Fla. Stat. (2000). The certification of a Presidential election by the Elections Canvassing Commission states only the number

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"Although the specific question you have asked has not been definitively answered by the courts, based upon the application of general statutory interpretation guidelines and the practices of the Department of State related to other provisions of the Florida Election Code, it is my opinion that Section 102.168, Florida Statutes is not intended to apply to the election of electors for President and Vice President of the United States."

[6] In the case of the presidential electors recommended prior to the election by the Florida Democratic Party, this would mean that Attorney General Bob Butterworth, Senate Minority Leader Buddy Dyer, Senators Daryl Jones, Kendrick Meek, and Les Miller, and Representative Robert Henriquez would all be in violation of Florida law because they failed to submit resignations from their current office before becoming candidates for the "office" of "presidential elector."

of votes received by the candidates for President. It does not "certify" the election of the President of the United States. The successful candidate for that office will not be determined until January 6, when the votes of the presidential electors will be counted. *See* 3 U.S.C. §15.

Third, had the Florida Legislature intended for Section 102.168 to provide a vehicle for contesting a presidential election, or the certification of presidential electors, it would have provided a mechanism for ordering meaningful relief under the statute. The relief contemplated under Section 102.168 is not only unavailable or inappropriate in light of the nature of the office, but preempted by federal law. For example, Section 102.168 provides, in the event "the contestant is found to be entitled to the office," for the entry of a judgment of "ouster" against the successful candidate. The courts of the state of Florida clearly lack the authority to enter a judgment of "ouster" against a sitting President of the United States. *See Fladell*, slip op. at 9, n.3 ("Surely, this Court is without authority to enter a judgment of 'ouster' against the President and Vice President of the United States.").[7]

Finally, had the Florida Legislature intended for Section 102.168 to provide a vehicle for contesting a presidential election, or the certification of presidential electors, it would have included procedures for the orderly contest of the election within the limited time allowed under federal law. Section 102.168 provides no guidance on this subject at all. *See Fladell*, slip op. at 9-10 ("The time limitations included in §102.168 do not necessarily coincide with the time con-

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[7] The impracticality of applying Section 102.168 to presidential elections is well illustrated by the case of *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 (Fla. 1998), which involved a contest arising out of the November 5, 1996 election of a county sheriff which was not finally resolved until the issuance of the Florida Supreme Court's opinion on March 19, 1998.

straints of 3 U.S.C.A. § 5."). Instead, the statute provides that the defendant has 10 days in which to prepare and file an answer. *See* § 102.168(6), Fla. Stat. (2000). This statute clearly was not designed to contest a Presidential election.

IV. GORE LACKS STANDING TO BRING AN ACTION UNDER FLORIDA STATUTES SECTION 102.168.

Assuming *arguendo* that Section 102.168 applies, it affords no relief to Gore. Section 102.168(1) permits only qualified voters, taxpayers and unsuccessful candidates to pursue an election contest. Gore does not and could not allege in his contest complaint that he is a voter, taxpayer, or unsuccessful candidate. Indeed, as a matter of law, the unsuccessful candidate in this election is not Gore, but the persons nominated to serve as presidential electors on their behalf. § 103.011, Fla. Stat. (2000). Thus, Gore has no standing to bring a contest, even if Section 102.168 allows a contest of presidential electors. Gore is not yet an unsuccessful candidate and cannot be until January 6, 2001. The unsuccessful candidates are the Democratic slate of electors. Accordingly, Gore's contest claim must be dismissed for lack of standing.

V. IF SECTION 102.168 APPLIES, THEN THE PRESIDENTIAL ELECTORS ARE INDISPENSABLE PARTIES.

Florida Statute Section 102.168(4), if applicable, also requires the compulsory joinder of each "successful candidate" as an indispensable party. The successful candidates here are not George W. Bush and Richard Cheney. The successful candidates are the Republican presidential electors, who were elected and certified under Section 103.011.

Accordingly, even if Section 102.168 applied to presidential electors, which it does not, Gore has failed to join as Defendants, the twenty-five presidential electors who have been certified pursuant to Section 103.011. Thus, pursuant to Rule 1.140(b)(7), Florida Rules of Civil Procedure, Gore's

Complaint should have be dismissed for failure to join indispensable parties. *See, e.g., Commodore Plaza, Etc. v. Saul J. Morgan Ent., Inc.*, 301 So. 2d 783 (Fla. 3d DCA 1974).

VI. THE CERTIFICATION OF ELECTORS MOOTED GORE'S ELECTION CHALLENGE.

As the above discussion amply demonstrates, Section 102.168 of the Florida Election Code *cannot* be read to provide the Florida Supreme Court with jurisdiction to adjudicate a contest to the certification of the results of the Presidential election.[8] This section also provides no basis for challenging the "Certificate of Ascertainment" that identifies the presidential electors from the State of Florida.

The Secretary of State, acting under Florida law, certified the results of the presidential election held on November 7. That certification triggered a series of events under Florida and federal law, including the transmittal of the "Certificate of Ascertainment of Presidential Electors" to the Archivist of the United States on November 27. That document identifies the "Republican Presidential Electors for the State of Florida." This Certificate of Ascertainment has independent effect under federal law, *see* 3 U.S.C. § 6, and it has not been challenged in this case.

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[8] Even if Section 102.168 provided a cause of action to contest the election, it is clear that Vice President Gore and Joseph Lieberman do not having standing under Section 102.168(1) because neither is an "unsuccessful candidate for such office," an "elector qualified to vote " (i.e. a Florida voter, and not a presidential elector, *see* § 97.021(10) and § 97.041(1), Florida Statutes (2000)), or a "taxpayer" in Florida.

VII. THE FLORIDA SUPREME COURT IS BARRED FROM FASHIONING A *NEW* PROCEDURE FOR ELECTING PRESIDENTIAL ELECTORS.

The Florida Legislature established procedures for selecting presidential electors prior to the November 7 general election. Those procedures are set forth in Chapter 103, Florida Statutes. The procedures in effect on November 7, 2000 did not allow, and no statute then promulgated by the Florida Legislature contemplated, any action to contest the certification of the results of the Presidential election in the Florida courts. Similarly, no statute in effect at the time of the November election provided any mechanism for contesting the "Certificate of Ascertainment" which was forwarded to the Archivist of the United States on November 27. Florida law does not provide any basis other than those codified in Chapter 103, Florida Statutes, for replacing duly certified presidential electors. To interpret the Florida Statutes to provide for the contest of either the certification of the election or the certification of the presidential electors, the court would have to establish *new* procedures for selecting electors for the State of Florida.[9] Any electors selected by this new procedure would be selection in violation of federal law. *See* 3 U.S.C. § 5.

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[9] Plaintiffs may not be without a remedy. On the day the votes of the presidential electors are tallied by Congress, the President of the United States Senate will "call for objections." The procedure for making and resolving such objections, including any appropriate objection to the certification of presidential electors, is set forth in 3 U.S.C. § 15 and 3 U.S.C. § 17.

CONCLUSION

For the foregoing reasons, the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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Dec 10, 2000

(8)

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No. 00-949

IN THE
Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
Petitioners,

v.

ALBERT GORE, JR., *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF RESPONDENTS CARR, HARRELL, RICHARDSON, SHULER, TEMPLE AND THOMAS IN SUPPORT OF THE RELIEF REQUESTED BY PETITIONERS

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STATEMENT OF THE CASE

The Respondents Glenda Carr, Lonnette Harrell, Terry Richardson, Gary H. Shuler, Keith Temple and Mark A. Thomas were allowed to intervene as parties in the Circuit Court for the Second Judicial Circuit of Florida in Case No. 00-2808. A copy of the Respondents' Motion for Order Allowing Intervention and their Emergency Petition for Declaratory Judgment that the Florida Statutory Scheme for a Manual Recount is Unconstitutional and Motion to Dismiss the Complaint to Contest Election is included in the Appendix as Exhibit 1.* The trial court granted the Respondents motion to intervene, and they subsequently participated as intervenor parties in the trial as reflected in the Circuit Court's Order included in the Appendix as Exhibit 2.* The Respondents filed a brief in the Florida Supreme Court, which is included in the Appendix as Exhibit 3.* Pursuant to the Rules of the Supreme Court of he United States and the Order of this Court directing the filing of briefs, Respondents submit the following document. The Respondents are not dissatisfied with Petitioners statements as provided in Supreme Court Rule 24.2.

INTRODUCTION OF ARGUMENT

Respondents contend that the Order of the Florida Supreme Court violates the equal protection and due process clauses of the Constitution of the United States. Additionally, Respondents would respectfully suggest that the December 8, 2000, Order of the Florida Supreme Court in Case No. SC00-2431 violates the mandate of this Court in the prior ruling in Case No. SC00-2431 that was issued on November 21, 2000. This Court's Order *vacated* the prior ruling of the Florida Supreme Court and remanded it with appropriate instructions. The Florida Supreme Court has not

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* The Appendix of Respondents is attached hereto.

entered an order pursuant to the mandate of this Court. Instead, the Florida Supreme Court, in its decision of December 8, 2000, No. SC00-2431, directed that the votes that had been counted pursuant to the vacated order of the Florida Supreme Court and counted under materially different standards of voter intent must be included in the Certification considered by the Florida Secretary of State. Such Order is thus in direct violation of this Court's mandate and is consequently a jurisdictional nullity.

Violation of Equal Protection and Due Process.

The Respondents are six voters residing in five different counties within the State of Florida and were voters in the Presidential Election of November 7th in their respective counties. They voted for the Bush-Cheney electors. Their respective counties of residence are Duval, Okaloosa, Bay, Calhoun, Duval and Leon. The voters have standing because they have a direct stake in the outcome of the election.

The majority decision of the Florida Supreme Court indicated no standard for the manual recount of the diverse types of ballots other than counting "undervotes" for a candidate when the counters find that "the clear indication of the intent of the voter" is present. It is respectfully submitted that such a "standard" is not one at all.

To count the "undervotes" in 67 counties,.whose canvassing boards apply their own interpretation of this fuzzy and nebulous standard, violates these voters due process and equal protection rights. This "standard" invites totally subjective counting, which will not allow any possibility of judicial review. Critically, it opens the door for political bias, even unintended political bias, to effect the election of a president. Such is totally unacceptable in a democratic republic governed by the rule of law.

Not only will such a "standard" allow the "undervotes" in the several counties to be treated differently and thereby violate all of the voters in Florida of their right to equal protection of the law, it also vindicates the already completed manual recount of the "undervotes" in Broward County and Palm Beach County, whose canvassing boards used varying and totally inconsistent standards to determine the intent of the voters.

Thus, the voters' ballots have been, and will be, treated differently, not only as a result of their votes having been cast in different counties, but will also be treated differently within each county. This obviously violates fundamental standards of due process and equal protection, and will forever cast a cloud over the results of the Presidential Election in Florida, regardless of which candidate "wins."

CONCLUSION

For these reasons, the Presidential Election results certified by the 67 counties' Supervisors of Elections to the Florida Secretary of State on November 14, 2000, should be deemed by this Honorable Court as the final results of the Florida Presidential Election. Because the Certification of the Bush electors is somewhat in doubt as a result of this Court's vacating of the Florida Supreme Court decision of November 21, 2000, it is respectfully submitted that this Court should deem the said November 14, 2000 results, which gave the Bush electors a plurality in Florida, require that Florida's 25 electoral college votes be cast by the Bush-Cheney electors.

Respectfully submitted,

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APPENDIX

APPENDIX

EXHIBIT 1

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA.

FILED
NOV 29, 2000

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, and JOSEPH I. LIEBERMAN, Nominee of the Democratic Party of the United States for Vice President of the United States,

Plaintiffs,

CASE NO. 00-2808

v.

KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, and SECRETARY OF AGRICULTURE BOB CRAWFORD, SECRETARY OF STATE KATHERINE HARRIS AND L. CLAYTON ROBERTS, DIRECTOR, DIVISION OF ELECTIONS, individually and as members of and as THE FLORIDA ELECTIONS CANVASSING COMMISSION,

and

THE MIAMI-DADE COUNTY CANVASSING BOARD, LAWRENCE D. KING, MYRIAM LEHR and DAVID C. LEAHY as members of and as THE MIAMI-DADE COUNTY

CANVASSING BOARD, and DAVID C. LEAHY, individually and as Supervisor of Elections,

and

THE NASSAU COUNTY CANVASSING BOARD, ROBERT E. WILLIAMS, SHIRLEY N. KING, AND DAVID HOWARD (on, in the alternative, MARIANNE P. MARSHALL), as members of and as the NASSAU COUNTY CANVASSING BOARD, and SHIRLEY N. KING, individually and as Supervisor of Elections,

and

THE PALM BEACH COUNTY CANVASSING BOARD, THERESA LEPORE, CHARLES E. BURTON AND CAROL ROBERTS, as members of and as the PALM BEACH COUNTY CANVASSING BOARD, and THERESA LEPORE, individually and as Supervisor of Elections,

and

GEORGE W. BUSH, Nominee of the Republican Party of the United States for President of the United States and RICHARD CHENEY; Nominee of the Republican Party of the United States for Vice President of the United States,

Defendants.

_____/

MOTION FOR ORDER ALLOWING INTERVENTION

COME NOW the Petitioners/Intervenors, GLENDA CARR, LONNETTE HARRELL, TERRY RICHARDSON, GARY H. SHULER, KEITH TEMPLE, and MARK A. THOMAS, by and through undersigned counsel, and hereby move the Court for an order allowing Petitioners/Intervenors to intervene in this case. As grounds for this motion, Petitioners/Intervenors state:

1. Attached hereto is the Petitioners'/Intervenors' Emergency Petition for Declaratory Judgment that the Florida Statutory Scheme for a Manual Recount is Unconstitutional and Motion to Dismiss the Complaint to Contest Election. Said Petition is hereby alleged and made a part of this motion to allow intervention.

2. The issues raised in the said Petition are ones that would be dispositive of all the issues raised in the Plaintiff's Complaint if the subject statutory scheme is deemed to be unconstitutional as alleged.

3. There will be no need to present extensive evidence on behalf of Petitioners/Intervenors. Indeed, other than the status of the Petitioners/Intervenors as registered voters and taxpayers in Florida and their respective counties, all evidence that will be presented by the parties already before the Court will suffice as evidence for the determination of all the facts and issues of law raised by Petitioners'/Intervenors' pleadings.

4. Petitioners/Intervenors have an interest in this litigation because all votes manually recounted in the counties unfairly selected by the Gore-Lieberman candidacy destroys their right to due process and equal protection of the law, and because the statutory scheme for manual recounting allows the losing candidates to intentionally and unfairly skew the election results thereby diminishing the weight of

Petitioners'/Intervenors' right to vote. See, Rule 1.230 Fla.R.Civ.P.

WHEREFORE, Petitioners/Intervenors pray that they be allowed to intervene and that the other parties be required to respond to the Petition and Motion to Dismiss within a truncated but reasonable period of time.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, hand delivery or facsimile transmission, on the 29th day of November, 2000, to the following:

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/s/ William Kemper Jennings
WILLIAM KEMPER JENNINGS

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA.

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, and JOSEPH I. LIEBERMAN, Nominee of the Democratic Party of the United States for Vice President of the United States,

Plaintiffs, CASE NO. 00-2808

v.

KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, and SECRETARY OF AGRICULTURE BOB CRAWFORD, SECRETARY OF STATE KATHERINE HARRIS AND L. CLAYTON ROBERTS, DIRECTOR, DIVISION OF ELECTIONS, individually and as members of and as THE FLORIDA ELECTIONS CANVASSING COMMISSION,

and

THE MIAMI-DADE COUNTY CANVASSING BOARD, LAWRENCE D. KING, MYRIAM LEHR and DAVID C. LEAHY as members of and as THE MIAMI-DADE COUNTY CANVASSING BOARD, and DAVID C. LEAHY, individually and as Supervisor of Elections,

and

THE NASSAU COUNTY CANVASSING BOARD, ROBERT E. WILLIAMS, SHIRLEY N. KING, AND DAVID HOWARD (on, in the alternative, MARIANNE P. MARSHALL), as members of and as the NASSAU COUNTY CANVASSING BOARD, and SHIRLEY N. KING, individually and as Supervisor of Elections,

and

THE PALM BEACH COUNTY CANVASSING BOARD, THERESA LEPORE, CHARLES E. BURTON AND CAROL ROBERTS, as members of and as the PALM BEACH COUNTY CANVASSING BOARD, and THERESA LEPORE, individually and as Supervisor of Elections,

and

GEORGE W. BUSH, Nominee of the Republican Party of the United States for President of the United States and RICHARD CHENEY, Nominee of the Republican Party of the United States for Vice President of the United States,

Defendants.

_____/

EMERGENCY PETITION FOR DECLARATORY JUDGMENT THAT THE FLORIDA STATUTORY SCHEME FOR A MANUAL RECOUNT IS UNCONSTITUTIONAL AND MOTION TO DISMISS THE COMPLAINT TO CONTEST ELECTION

COME NOW the Petitioners/Intervenors GLENDA CARR, LONNETTE HARRELL, TERRY RICHARDSON, GARY H. SHULER, KEITH TEMPLE and MARK A. THOMAS, and hereby petition this Court for a declaratory decree that those portions of Chapter 102, Florida Statues, providing for a manual recount of votes for the electors of the respective Presidential and Vice-Presidential candidates be declared unconstitutional and furthermore that the contest of the election filed herein by the Plaintiffs be dismissed. As grounds therefor, Petitioners/Intervenors state:

1. Each of the Petitioners/Intervenors are registered voters and taxpayers in the State of Florida, reside in counties which cast ballots for the electors of the respective Presidential and Vice-Presidential candidates, and each Petitioner voted for George W. Bush and Dick Cheney in the election held on November 7, 2000.

2. Venue is in Leon County because this action is pending in Leon County, Florida.

3. The Petitioners/Intervenors are:

a. GLENDA CARR, a resident of Duval County, Florida

b. LONNETTE HARRELL, a resident of Okaloosa County, Florida.

c. TERRY RICHARDSON, a resident of Bay County, Florida.

d. GARY H. SHULER, a resident of Calhoun County, Florida.

e. KEITH TEMPLE, a resident of Duval County, Florida

f. MARK A. THOMAS, a resident of Leon County, Florida.

4. The election which is the subject matter of this Petition involved the votes of registered voters throughout the 67 counties of the State of Florida, and the process by which Florida Statute 102.166 allows for the determination of a manual recount purportedly enables a presidential or vice-presidential candidate and such candidates' party to obtain a manual recount of only a few of those counties where such candidate won the election in order to enable such candidate or candidates to enhance the amount of votes determined to have been cast for such candidate or candidates.

5. This procedure allows the candidate who loses the popular vote in the entire State of Florida to select arbitrarily, and without consideration of other counties which have discredited or "undervoted" ballots, to seek to undermine the statewide election result by selecting counties for manual recount only in those counties where there will be an enhancement of such candidates' vote in the statewide tabulation. Some of the Petitioners/Intervenors reside in Florida counties where there were a great many discredited or "undervoted" ballots.

6. This type of procedure ignores the logical purpose of the manual recount statute: Permitting the losing candidate or party in the election to seek a manual recount, but only if such a manual recount will correct errors which could affect the outcome of the election. Section 102.166(5), Florida Statutes.

7. The process ignores the obvious truth that the candidate who wins the popular vote in a statewide tabulation has absolutely no motive or reason to demand a manual recount within 72 hours of the election results, and thereby the statutory scheme arbitrarily, capriciously and illogically allows the losing candidate in the statewide election, but the winning candidate in counties of the candidates' own choosing, to demand a manual recount without including the discarded and/or uncounted ballots in the counties where the winner of the statewide tabulation is likely to obtain a greater number of votes through a manual recount or such discarded or uncounted ballots.

8. Such a scheme is arbitrary, capricious and undermining of the people's right to vote and be heard, and thereby completely destroys the equality of the voting rights of all the registered voters of Florida, including Petitioners/Intervenors, who cast ballots on November 7, 2000, in counties other than where the losing candidates chose to demand a manual recount. The Petitioners/Intervenors are within such category of voters whose voting rights have been diminished by the actions of Albert Gore, Jr. and Joseph I. Lieberman.

9. Even the Democratic attorney general, Robert A. Butterworth, acknowledges the obvious risk to the disenfranchising of the voters of the State of Florida when certain counties are allowed to be recounted to the exclusion of other counties. See Attorney General's letter to Charles E. Burton, Chairman, Palm Beach County Canvassing Board, dated November 14, 2000, which is attached hereto and made a part hereof.

10. Whether a particular candidate or political party filed a request for a manual recount within the time period provided by Florida law in no way waives the right of the individual

voters to have their ballots or votes treated equally under the United States Constitution, Amendments V and XIV. Moreover, any such waiver by a candidate or political party cannot deprive the individual voters of their right to due process of law as guaranteed by the United States Constitution, Amendments V and XIV.

11. The electoral canvassing committees that are charged by the statutory scheme with the responsibility of conducting the manual recount have absolutely no parameters established by law to guide them in their divination of the "intent of the voter." They can, under the present circumstances, determine that a vote was cast for a candidate even if there is no clear indication of such intent.

12. These canvassing boards have attempted to "read the minds" of the voter who may have determined that he or she was not going to vote for any Presidential candidate, or may have started to vote for a Presidential candidate and then determined that he or she could not bring himself or herself to vote for anyone in the Presidential race. Indeed, this is an extremely probable state of mind for a high percentage of voters in what has been a very close election making it difficult for many to determine the one for whom to vote.

13. For the reasons described above, the Florida statutory scheme for manual recounting, both on its face and as applied in the circumstances of this election, is unconstitutionally vague and/or overbroad and violates the Petitioners'/Intervenors' right to due process and equal protection of law, and constitutionally diminishes their right to vote under the aforesaid provisions of the United States Constitution.

14. Moreover, the statutory provisions providing for a manual recount are not reasonably related to the purpose of allowing a losing candidate to seek determination of the true

result of all the votes in the subject election. These provisions permit a candidate who loses the statewide popular vote but wins in some counties, often overwhelmingly, to choose only those counties for the purpose of a recount; and such scheme impermissibly allows the state-wide loser to, with Machiavellian purpose, undermine the weight and value of the votes in those counties where such candidate lost, often overwhelmingly. This statutory scheme therefore does not provide for a more accurate reflection of the will of the voters but allows for an unfair and false image of the statewide vote tabulation.

15. Such a scheme violates the due process clauses, the equal protection clause, and the constitutional protection of each individual's right to vote under the provisions of the United States Constitution, Amendments V and XIV.

WHEREFORE, Petitioners pray that this Court will declare the said statutes providing for a manual recount, on their faces and as applied, to be violative of the Petitioners'/Intervenors' right to have their vote treated equally and right to due process of law. Further, Petitioners pray that the Court, due to the said unconstitutionality, enter an order dismissing Plaintiffs' complaint.

DATED this 29th day of November, 2000.

Respectfully submitted,

/s/ William Kemper Jennings
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Florida Attorney General

November 14, 2000

The Honorable Charles E. Burton
Chair, Palm Beach County Canvassing Board
County Courthouse
West Palm Beach, Florida 33401

Dear Judge Burton:

Attached is the legal opinion requested by the Board.

The circumstances surrounding these legal issues are extremely serious. If hand recounts have already occurred in Seminole County and an unknown number of other counties without the restraint of a legal opinion while similar hand counts are blocked in other counties due to a newly issued standard, a two-tier system for reporting votes results.

A two-tier system would have the effect of treating voters differently, depending upon what county they voted in. A voter in a county where a manual count was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted.

As the State's chief legal officer, I feel a duty to warn that if the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official canvassing boards, the State will incur a legal jeopardy, under both the U.S. and State constitutions. This legal jeopardy could potentially lead to Florida having all of its votes, in effect, disqualified and this state being barred from the Electoral College's selection of a President.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/dmm

EXHIBIT 2

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA.

ALBERT GORE, JR., et al.,
Plaintiffs,
vs.
KATHERINE HARRIS, as Secretary
of State, STATE OF FLORIDA, et al.,
Defendants.
_____/

CASE NO. 00-2808

IN RE:	Ruling
BEFORE:	HONORABLE N. SANDERS SAULS Circuit Court Judge
DATE:	Monday, December 3, 2000
TIME:	Commenced: 4:30 p.m. Concluded: 6:31 p.m.
LOCATION:	Leon County Courthouse Courtroom 3D Tallahassee, Florida
REPORTED BY:	B. J. QUINN, RPR, CMR, CP Certified Realtime Reporter Notary Public in and for the State of Florida at Large

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PROCEEDINGS

THE COURT: All right. At this time we'd call the case of Albert Gore, et al., versus Catherine Harris, et al., Case Number 00-2808.

At this time, the action having been tried, the Court at this time will enter its ruling from the bench, as to the exigencies surrounding this case, the ruling and findings shall be incorporated into the final judgment, and shall be immediately entered herein.

At this time the Court finds and concludes as follows: The complaint filed herein states in its first paragraph that this is an action to contest the state certification in the presidential election of 2000, asserting that the state Elections Canvassing Commission's certification on in November 26th, 2000, was erroneous, and the vote totals wrongly included illegal votes, and do not include legal votes that were improperly rejected.

Plaintiffs further contest the State of Florida's certification of the electors for George W. Bush and Richard Cheney as being elected.

They further challenge and contest the election certifications of the Canvassing Boards of Dade, Palm Beach, and Nassau Counties.

As to the Dade Canvassing Board, the Plaintiffs seek to compel the Dade board to include in its certification, and the state elections canvassing commission to include in the certification, a six-vote change in favor of Plaintiffs, resulting from the board's initial test and partial manual recount of one-percent of the countywide vote total conducted with respect to three precincts, designated by the Plaintiffs designee.

Also, additional votes manually hand-counted, and a further partial recount total resulting from the board's

discretionary decision to stop completion of a full manual recount of all the votes and all the precincts in Dade, because of insufficiency of time to complete the same.

These represent the results of the count of an additional 136 precincts of the 635 precincts in Dade County.

And, also, the results of any Court order, manual review and recount of some nine to ten thousand voter cards or ballots, which at Plaintiff's request, have been separated, or were separated as alleged undervotes by the Dade Canvassing Board, or the Dade Supervisor of Elections, as a result of all of the countywide ballots being processed through the counting machines a third time and being nonreadable by the machine.

As to the Palm Beach Canvassing Board, Plaintiffs seek to compel the Palm Beach board to include in its certification, and the State Elections Canvassing Commission to include, in the state certification, additional votes representing the results of an attempted partial certification of results, completed before the November 26th, 2000 deadline, mandated by the Florida Supreme Court, as well as the additional remainder of the results of the manual recount, which was completed after the deadline, and the attempted certification thereof on December 1.

And in addition, the result of any Court ordered manual review and recount of some 3,300 ballots which were objected to during the Palm Beach board's manual recount which Plaintiffs allege should have been counted as ballot votes because that board used an improper standard.

As to Nassau, the Nassau County Canvassing Board, the Plaintiffs seek to compel the Nassau Board to amend its certification, and the State Elections Canvassing Commission to amend the state certification to reflect and include the results of the boards' machine recount, rather than the results of the

board's original machine count, thereby resulting in a favorable net gain to Plaintiffs, of 51 votes.

It is established law of Florida as reflected in State v. Smith that where changes or charges of irregularity of procedure or inaccuracy of returns in balloting and counting processes have been alleged, that the Court must find as a fact that a legal basis for ordering any recount exists before ordering such recount.

Further, it is well established and reflected in the opinion of Judge Joanos and Smith v. Tine, that in order to contest election results under Section 102.168 of the Florida Statutes, the Plaintiff must show that, but for the irregularity, or inaccuracy claimed, the result of the election would have been different, and he or she would have been the winner.

It is not enough to show a reasonable possibility that election results could have been altered by such irregularities, or inaccuracies, rather, a reasonable probability that the results of the election would have been changed must be shown.

In this case, there is no credible statistical evidence, and no other competent substantial evidence to establish by a preponderance of a reasonable probability that the results of the statewide election in the State of Florida would be different from the result which had been certified by the State Elections Canvassing Commission.

The Court further finds and concludes the evidence does not establish any illegality, dishonesty, gross negligence, improper influence, coercion, or fraud in the balloting and counting processes.

Secondly, there is no authority under Florida law or certification of an incomplete manual recount of a portion of, or less than all ballots from any county by the state elections canvassing commission, nor authority to include any returns

submitted past the deadline established by the Florida Supreme Court in this election.

Thirdly, although the record shows voter error, and/or, less than total accuracy, in regard to the punchcard voting devices utilized in Dade and Palm Beach Counties, which these counties have been aware of for many years, these balloting and counting problems cannot support or effect any recounting necessity with respect to Dade County, absent the establishment of a reasonable probability that the statewide election result would be different, which has not been established in this case.

The Court further finds that the Dade Canvassing Board did not abuse its discretion in any of its decisions in its review in recounting processes.

Fourthly, with respect to the approximate 3,300 Palm Beach County ballots of which Plaintiffs seek review, the Palm Beach Board properly exercised its discretion in its counting process, and had judged those ballots which the Plaintiff wish this Court to, again, judge de novo.

The old cases upon which Plaintiff rely are rendered upon mandamus prior to the modern statutory election system and remedial scheme enacted by the Legislature of the State of Florida in Chapter 102 of the Florida Statutes.

The local boards have been given broad discretion which no Court may overrule, absent a clear abuse of discretion.

The Palm Beach County board did not abuse its discretion in its review and recounting process.

Further, it acted in full compliance with the order of the Circuit Court in and for Palm Beach County.

Having done so, Plaintiffs are estopped from further challenge of this process and standards. It should be noted, however, that said process and standards were changed from

the prior 1990 standards, perhaps contrary to Title III, Section (5) of the United States code.

Furthermore, with respect to the standards utilized by the Board in its review and counting processes, the Court finds that the standard utilized was in full compliance with the law and reviewed under another standard would not be authorized, thus creating a two-tier situation within one county, as well as with respect to other counties.

The Court notes that the Attorney General of the State of Florida enunciated his opinion of the law with respect to this, in a letter dated November 14, 2000, to the Honorable Charles E. Burton, Chair of the Palm Beach County Canvassing Board, which, in part, is as follows: "A two-tier system would have the effect of treating voters differently, depending upon what county they voted in."

The voter in a county where a manual count was conducted, would benefit from having a better chance of having his or her vote actually counted, than a voter in a county where a hand count was halted. As the State's chief legal officer, I feel a duty to warn that the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official Canvassing Boards, the State will incur a legal jeopardy under both the United States and the state constitutions.

This legal jeopardy could potentially leave Florida having all of its votes, in effect, disqualified, and this state being barred from the Electoral College's election of a President.

The Court finds further that the Nassau County Canvassing Board did not abuse its discretion in its certification of Nassau County's voting results.

Such actions were not void or illegal, and was done with the proper exercise -- within the proper exercise of its discretion upon adequate and reasonable public notice.

Further, this Court would further conclude and find that the properly stated cause of action under Section 102.168 of the Florida Statutes to contest a statewide federal election, the Plaintiff would necessarily have to place at issue and seek as a remedy with the attendant burden of proof, a review and recount on all ballots, and all of the counties in this state with respect to the particular alleged irregularities or inaccuracies in the balloting or counting processes alleged to have occurred.

As recently stated by Judge Kline with the concurrence of Chief Judge Warner in the Fourth District Court of Appeal case, of Bedell v. Palm Beach Canvassing Board, Section 102.168 provides in Subsection (1) that the certification of elections may be contested for presidential elections. Section 103.011 provides that, "The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes."

There is in this type of election, one statewide election, and one certification. Palm Beach County did not elect any person as a presidential elector, but, rather, the election with the winner-take-all proposition, dependent on the statewide vote.

Finally, for the purpose of expedition, due to the exigencies surrounding these proceedings, this Court will deny those portions of the pending motions to dismiss of the various parties herein not affected by or ruled upon in these findings and conclusions in those portions consisting solely of matters of law being reviewable upon such denial.

In conclusion, the Court finds that the Plaintiff failed to carry the requisite burden of proof, and the judgment shall be

hereby entered, and the Plaintiffs will take nothing by this action. All ballots in the possession of the Clerk of this Court shall remain pending review. A judgment will be entered and filed with the Clerk immediately following this hearing.

(HEARING CONCLUDED AT 4:48 P.M.)

1, through 14, are a true and correct record of the aforesaid proceedings.

Certified Realtime Reporter
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My Commission Expires March 20, 2001

CERTIFICATE OF NOTARY

STATE OF FLORIDA:
COUNTY OF LEON:

I, B. J. QUINN, Notary Public in and for the State of Florida at Large, do hereby certify that the witness personally appeared before me and was first duly sworn by me to testify to the truth on the date and time indicated herein.

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EXHIBIT 3

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2431

DCA CASE NO. 1D00-4745

LOWER CASE NO. 00-2808

ALBERT GORE, JR., Nominee of the Democratic Party of the Democratic Party of the United States for President of the United States, and JOSEPH I. LIEBERMAN, Nominee of the of the Democratic Party of the United States for Vice President of the United States,

Appellants

v.

KATHERINE HARRIS, as SECRETARY OF STATE, et al.,
Appellees

On Discretionary Review Of A Question Certified By The District Court Of Appeal, First District, To Be Of Great Public Importance Requiring Immediate Resolution By This Court

---

AMENDED BRIEF OF APPELLEES/INTERVENORS GLENDA CARR, LONNETTE HARRELL, TERRY RICHARDSON, GARY H. SHULER, KEITH TEMPLE, AND MARK A. THOMAS

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II. THE APPLICATION OF THE FLORIDA MANUAL RECOUNT STATUTES IN CHAPTER 102, FLORIDA STATUTES, SO AS TO ALLOW THE LOSING CANDIDATES IN THE STATEWIDE ELECTION, ALBERT GORE, JR. AND JOSEPH I. LIEBERMAN, TO SEEK A MANUAL RECOUNT IN THREE COUNTIES WHERE THEY WON OVERWHELMINGLY IS VIOLATIVE OF

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Chapter 102, Florida Statutes . . . . . [32a, 33a, 34a, 39a]

UNITED STATES CONSTITUTION

U.S. CONST. amend V . . . . . [32a, 33a, 34a, 39a,40a]

U.S. CONST. amend XIV . . . . . [32a, 33a, 34a, 39a, 40a]

STATEMENT OF THE CASE AND FACTS

Appellees/Intervenors adopt the statements of the case and facts posited by Appellee GEORGE W. BUSH and Appellee KATHERINE HARRIS provided, however, that the following supplements said statements of the case and facts.

Appellees/Intervenors are registered voters in their respective counties who voted for the electors of Governor George W. Bush for the office of President of the United States. They reside and voted in counties which were not subject to any manual recount after the election of November 7, 2000. They are:

GLENDA CARR, a resident of Duval County, Florida;

LONNETTE HARRELL, a resident of Okaloosa County, Florida;

TERRY RICHARDSON, a resident of Bay County, Florida;

GARY SHULER, a resident of Calhoun County, Florida;

KEITH TEMPLE, a resident of Duval County, Florida; and

MARK A. THOMAS, a resident of Leon County, Florida.

These voters were allowed to intervene on the basis of their allegations in their petition for declaratory judgment that the manual recount provisions of Chapter 102, Florida Statutes, were facially or in their application in the November 7, 2000 presidential election violative of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Importantly, these Intervenors did not waive the claims asserted in such petition or herein

because the manual recount provisions do not permit a voter who is not a candidate to seek a manual recount.

ARGUMENT

I. IF THIS COURT EXERCISES ITS DISCRETIONARY JURISDICTION TO REVIEW THIS CASE AS ONE OF GREAT PUBLIC IMPORTANCE REQUIRING IMMEDIATE DETERMINATION BY THIS COURT, AN ESSENTIAL ISSUE BEFORE THE COURT IS WHETHER THE SUBJECT APPLICATION OF THE MANUAL RECOUNT PROVISIONS OF CHAPTER 102, FLORIDA STATUTES, ARE CONSTITUTIONAL UNDER THE PROVISIONS OF THE FIFTH AND FOURTEENTH AMENDMENTS' DUE PROCESS AND EQUAL PROTECTION CLAUSES.

Appellees/Intervenors defer to the arguments of Appellee George W. Bush and Appellee Katherine Harris in regard to whether this court should exercise its discretionary jurisdiction and review the merits of Appellants' case. However, if this court exercises its discretionary jurisdiction to review this case as one of great public importance requiring immediate determination by this court, an essential issue before the court is whether Gore's attempted application of the manual recount provisions of Chapter 102, Florida Statutes, are constitutional under the provisions of the Fifth and Fourteenth Amendments' Due Process and Equal Protection of Law clauses.

II. THE APPLICATION OF THE FLORIDA MANUAL RECOUNT STATUTES IN CHAPTER 102, FLORIDA STATUTES, SO AS TO ALLOW THE LOSING CANDIDATES IN THE STATEWIDE ELECTION, ALBERT GORE, JR. AND JOSEPH I. LIEBERMAN, TO SEEK A MANUAL RECOUNT IN THREE COUNTIES WHERE THEY WON OVERWHELMINGLY IS VIOLATIVE OF THE APPELLEES'/INTERVENORS' RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellants, the Democratic candidates for President and Vice President of the United States have sought a manual recount of disqualified or rejected ballots in selected counties of the State of Florida, to-wit: Broward County, Palm Beach County, and Miami-Dade County. They have not requested a manual recount of disqualified, rejected, or "undervotes" in other counties within Florida. They have selected only those counties where they obtained an overwhelming majority vote. This application of the manual recount statute violates Appellees/Intervenors' right to due process and equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution.

As pointed out by the trial court, the Florida Attorney General, Robert Butterworth, had indicated that such selected and limited procedure could be violative of these constitutional provisions and thereby jeopardize the enfranchisement of all Florida voters. In his findings of fact, the trial judge quoted from Attorney General Butterworth's letter to Judge Burton of the Palm Beach County Canvassing Board:

SAULS: Furthermore, with respect to the standards utilized by the Board in its review and counting processes, the Court finds that the standard utilized was in full compliance with the law and review under another standard would not be authorized thus creating a two-tier situation within one county, as well as with respect to other counties.

The Court notes that the Attorney General of the State of Florida enunciated his opinion of the law with respect to this, in a letter dated November 14, 2000, to the Honorable Charles E. Burton, Chair of the Palm Beach Canvassing Board, which, in part, is as follows: "A two-tier system would have the effect of treating voters differently, depending upon what county they voted in."

The voter in a county where a manual count was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand county was halted. As the State's chief legal officer, I feel a duty to warn that if the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official Canvassing Boards, the State will incur a legal jeopardy under both the United States and the state constitutions.

This legal jeopardy could potentially leave Florida having all of its votes, in effect, disqualified, and this state being

> barred from the Electoral College's election of a President. Court Ruling Transcript, December 4, 2000, Case No. CV-00-2808, *Gore v. Katherine Harris, as Secretary of State, et al.*, (2d Fla.Cir.Ct. 2000). [Emphasis added]

There is serious doubt as to whether the statutory provisions calling for an application for a manual recount are intended to be used in a statewide election. However, even if such provisions are so intended, their use so as to "cherry pick" three counties is unconstitutional under the due process and equal protection clauses of the United States Constitution. Appellants have attempted selected and limited application of the manual recount provisions in a manner clearly designed to weigh heavily in favor of the Gore-Lieberman candidacy. The court below recognized this:

> Further, this court would further conclude and find that the properly stated cause of action under Section 102.168 of the Florida Statutes to contest a statewide federal election, the Plaintiff would necessarily have to place at issue and seek as a remedy with the attendant burden of proof, a review and recount on all ballots and all of the counties in this state with respect to the particular alleged irregularities or inaccuracies in the balloting or counting processes alleged to have occurred. *Id.*

Determining that the methods by which Gore-Lieberman sought a manual recount in the three (3) counties he selected violates the equal protection and the due process clauses of the United States Constitution is dispositive of all issues raised by Appellants. In other words, the election results certified to the Secretary of State either on November 14th or before the

extended deadline established by this Court, both of which gave Governor Bush a plurality in Florida, would be final results because the selective manual recount sought by Gore-Lieberman is unconstitutional.

Alleged infringement of voting rights is subject to careful scrutiny:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. *Reynolds v. Sims*, 377 U.S. 533, 561, 84 S.Ct. 1362, 1381 (1964).

The United States Supreme Court had dealt with the question of equal protection of voter rights under many circumstances where a disparity exists or could exist between representation afforded to a citizen in one part of a state versus that afforded to a citizen in another part of the state. In the instant case the Appellees/Intervenors contend that a two-tiered vote counting system violates the due process and equal protection clauses. Such a two-tiered system is like the problem presented in *Reynolds* where reapportionment was at issue:

> The fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state. *Reynolds*, at 561.

The specific allegation in *Reynolds* was that voters in one part of the State of Alabama had greater representation per

person in the State Legislature than voters in another part of Alabama. The United States Supreme Court concluded:

> A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of government of the people, by the people, (and) for the people. The Equal Protection Clause demands no less than substantially equal state legislative representation for, all citizens of all places as well as of all races. *Reynolds,* at 568.

In the present case, the statutory provisions providing for a manual recount as urged by Gore-Lieberman was not reasonably related to the plain legislative purpose of allowing a losing candidate to seek determination of the true result of all the votes in the subject election. These provisions of Florida law as argued by Appellants would permit a candidate who loses the statewide popular vote but wins in some counties, often overwhelmingly, to choose only those counties for the purpose of a recount. Such application would impermissibly allow the statewide loser to undermine the weight and value of the votes in those counties where such candidate lost, often overwhelmingly. This misapplication of Florida election law therefore does not provide for a more accurate reflection of the will of the voters but in fact allows for an unfair distortion of the statewide vote.[1]

---

[1] There were other counties in the State of Florida that employed similar or identical "votematic" machines where substantial amount of "undervotes" occurred. Many of these counties were carried by the Bush electors in overwhelming numbers. For example, Duval County results indicate an approximate 55% majority for Governor Bush; Collier County results showed approximately 66% for Governor Bush; Indian River County showed approximately 59% for Governor Bush; and

Thus, the application of the statute proposed by Gore-Lieberman violated the due process clauses, the equal protection clause, and the constitutional protection of each individual's right to vote under the provisions of the United States Constitution, Amendments V and XIV. Appellants' application of Florida election law would travel well down the path to making Attorney General Butterworth's warning of disenfranchising all the voters in Florida a reality.

Although Appellees/Intervenors have found no precedent with the exact circumstances presented by the application of the manual recount provisions urged by the Gore-Lieberman candidacy, the United States Supreme Court's decisions establishing the "one man, one vote" rule are controlling. See *Reynolds*. No election system established or applied under state law may give the votes for a particular candidate or political party more weight than the votes for the other candidates or parties. Exactly as the long-rejected schemes of gerrymandering created election advantages for a particular party or candidate, the misapplication of the Florida manual recount statutes, Chapter 102, by the Gore-Lieberman candidacy has diluted the votes of the Appellees/Intervenors and all the other voters in counties where a manual recount was not effected. This discrimination violates the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Marion County showed approximately 55% for Governor Bush. There were many other counties with the "votematic" system carried by Governor Bush which also had "undervotes." Moreover, because Governor Bush carried fifty one (51) of the sixty seven (67) counties in Florida, there were many other counties using different election equipment, and some of these counties also had substantial "undervotes."

This information was provided by the Exhibits submitted into evidence by the Secretary of State and by the testimony of the statistical experts. See Secretary Harris' Exhibits S-DX3, S-DX4 and S-DX9.

Finally, there is another constitutional issue in regard to this election contest. Governor Bush and Vice President Gore are not running for an office in Florida and are not elected to any office by the citizens of the State of Florida. Appellants have totally ignored the constitutional provisions regarding presidential electors. This issue has been addressed by Intervenor Thrasher, a currently certified Republican elector. Appellees/Intervenors adopt and concur in the Motion to Dismiss as presented by Intervenor Thrasher which we respectfully submit is a threshold issue. Should this Court reject the position of Intervenor Thrasher, we respectfully urge for the reasons set forth above that the Court deny the relief sought by Gore-Lieberman because such relief would offend the due process and equal protection clauses.

CONCLUSION

The application of the manual recount statutes as proposed by Gore-Lieberman creates a "two-tiered" system of counting votes and thereby, as Attorney General Butterworth has warned, threatens the disenfranchisement of all Florida voters in the Electoral College.

WHEREFORE, Appellees/Intervenors urge this Court to deny Appellants' requested relief of requiring the manual recount of votes in their selected counties. As discussed above, to grant such relief would apply the Florida manual recount provisions in a manner violative of Appellees'/Intervenors' rights to due process and equal protection under law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

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CERTIFICATE OF SIZE AND STYLE OF TYPE

I HEREBY CERTIFY that the font used in the body of this brief is 12-point Courier, a font that is not proportionately spaced.

/s/ William Kemper Jennings
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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or hand delivery or facsimile transmission, on this 6th day of December, 2000, to the following:

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(17)

No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
Petitioners,

v.

ALBERT GORE, JR., ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I. Whether the Florida Supreme Court's decision interpreting and applying the provisions governing contest proceedings in Florida's Election Code according to established canons of statutory construction violates Article II, § 1, cl. 2.

II. Whether the Florida Supreme Court's decision is inconsistent with 3 U.S.C. § 5.

III. Whether the Florida Supreme Court's decision, enforcing Florida's contest provisions by ordering the manual review of ballots not counted by machines under the legal standard for determining their validity specified in Fla. Stat. § 101.5614, violates either the Equal Protection Clause or Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below: Governor George W. Bush, as nominee of the Republican Party for President of the United States; Richard Cheney, as nominee of the Republican Party for Vice President of the United States; Vice President Al Gore, as nominee of the Democratic Party for President of the United States; Joe Lieberman, as nominee of the Democratic Party for Vice President of the United States; Katherine Harris, as Secretary of State, State of Florida; Katherine Harris, Bob Crawford, and Laurence C. Roberts, individually and as members of the Florida Elections Canvassing Commission; the Miami-Dade County Canvassing Board; Lawrence C. King, Myriam Lehr, and David C. Leahy, as members of the Miami-Dade County Canvassing Board, and David Leahy, individually and as Supervisor of Elections; the Nassau County Canvassing Board; Robert E. Williams, Shirley N. King, and David Howard (or, in the alternative, Marianne P. Marshall), as members of the Nassau County Canvassing Board, and Shirley N. King, individually and as Supervisor of Elections; the Palm Beach County Canvassing Board; Theresa LePore, Charles E. Burton, and Carol Roberts, as members of the Palm Beach County Canvassing Board, and Theresa LePore, individually and as Supervisor of Elections; and Stephen Cruce, Teresa Cruce, Terry Kelly, Jeanette K. Seymour, Matt Butler, John E. Thrasher, Glenda Carr, Lonnette Harrell, Terry Richardson, Gary H. Shuler, Keith Temple, and Mark A. Thomas, as Intervenors.

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INTRODUCTION

This case raises the most fundamental questions about the legitimacy of political power in our democracy. In this case, the Court will decide whether the Electors for President of the United States, and thus the President of the United States himself, will be chosen by ascertaining the actual outcome of the popular vote in Florida in the election of November 7, 2000, or whether the President will instead be chosen without counting all the ballots lawfully cast in that state. The Florida Supreme Court has determined, in a way that would be unremarkable but for the stakes in this election, that in order to determine whether lawfully cast ballots have been wrongfully excluded from the certified vote tally in this election, they must be examined. This is basic, essential to our democracy, and to all that gives it legitimacy.

The central question posed by this case is whether any provision of federal law legitimately forecloses the Florida Supreme Court from interpreting, applying, and enforcing the statutes enacted by the Florida Legislature to determine all election contests and ascertain the actual outcome of the popular vote in any such election. See Fla. Stat. § 102.168; see also Florida Election Code, Fla. Stat. §§ 97.011-106.37. This process – which operates by popular vote and employs administrative and judicial processes when needed to ascertain which candidate has prevailed – is the only provision by which the Florida Legislature has established the manner of appointing Florida's Presidential electors in the 2000 general election. They are common provisions that have been adopted and utilized for decades in the vast majority of the States. See *infra*. These statutes expressly provide for "judicial determination" of any contest to determine the rightful winner of an election, as called for by 3 U.S.C. § 5. Those statutes having been faithfully applied by the Florida Supreme Court in this case, the question is whether this Court may properly override Florida's own state-law process for determining the rightful winner of its electoral votes in this Presidential election.

Such intervention would run an impermissible risk of tainting the result of the election in Florida – and thereby the nation. For

this Court has long championed the fundamental right of all who are qualified to cast their votes "and to have their votes counted." *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1964). Petitioners' request that this Court intervene in a state electoral process to ensure that votes are *not* counted turns *Sims* on its head. In the end, notwithstanding fears as to how "counting of [the] votes" may "cast[] a cloud upon what [Governor Bush] claims to be the legitimacy of his election," *Bush* v. *Gore*, No. 00-949 (A-504), Slip op. at 2 (Dec. 9, 2000) (Scalia, J., concurring), there can be little doubt that a count of the still uncounted votes, as the Florida Supreme Court ordered in this case, will eventually occur. The only question is whether these votes will be counted before the Electoral College meets to select the next President, or whether this Court will instead relegate them to be counted only by scholars and researchers under Florida's sunshine laws, after the next President is elected. Nothing in federal law, the United States Constitution, or the opinions of this Court compel it to choose the second course over the first.

OPINIONS BELOW

The opinion of the Florida Supreme Court in the contest proceeding is unreported and is set forth in Exhibit A to the application for stay. The order of the Leon County Circuit Court in that proceeding is unreported and is set forth in Exhibits B and C to the stay application. The opinion of this Court in a distinct but related case involving many of the same parties, see *Bush* v. *Palm Beach County Canvassing Bd.*, No. 00-836, Slip op. (U.S. Dec. 4, 2000) (per curiam) (hereinafter *Palm Beach County*), is reported at 2000 WL 1769093 and is set forth in Exhibit D to the stay application.

JURISDICTION

The Florida Supreme Court entered judgment on December 8, 2000. An application for stay was filed on the same day. On December 9, 2000, the stay was granted; the application was treated as a petition for certiorari that also was granted. This Court has jurisdiction under 28 U.S.C. § 1257 to review the

judgment of the Florida Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions at issue are reproduced in the appendix to this brief. See S. Ct. R. 24.1(f).

STATEMENT OF THE CASE

This case arises from a contest proceeding under the Florida Election Code to ascertain which Presidential candidate is the rightful winner of Florida's electoral votes in the 2000 general election. See Fla. Stat. § 102.168. Florida's election law establishes two distinct phases for the resolution of disputes regarding the outcome of an election. The first phase – the "protest" action – runs from election day through the certification of the election's results. It involves the reports of county canvassing boards to the Secretary of State and Elections Canvassing Commission, and the resolution by the county canvassing boards of any protests filed pursuant to Fla. Stat. § 102.166. This aspect of Florida's election law was before this Court in *Palm Beach County Canvassing*, *supra*, which sets out in more detail the factual background to this case. See *id.*, Slip op. at 1-4.

The second, post-certification phase for resolution of election disputes is the "election contest action" created by the Legislature in Fla. Stat. § 102.168. That law provides that "the certification of election * * * of any person to office * * * may be contested in the circuit court by any unsuccessful candidate for such office * * * or by any elector qualified to vote in the election related to such candidacy." One of the legislatively specified grounds for contesting any election is the "rejection of a number of legal votes sufficient to change or place in doubt the result of election." *Id.* § 102.168(3)(c). The Legislature expressly provided the state's courts with broad authority both to investigate claims in contest actions and to fashion "any relief appropriate under such circumstances." *Id.* § 102.168(8).

Indeed, throughout the litigation over the certification results,

petitioners themselves identified the contest procedure as the proper manner in which respondent Gore could seek a remedy for the problem of uncounted votes in Florida. See, *e.g.*, Answer Brief of George W. Bush before the Florida Supreme Court in *Palm Beach County Canvassing Bd.* v. *Harris*, Nos. SC00-2346, SC00-2348, & SC00-2349, at 18 (filed Nov. 19, 2000) (accusing respondent Gore of "substitut[ing] the certification process of Section 102.111 and Section 102.112 for the contested election process of Section 102.168 as the means for determining the accuracy of vote tallies"). As the Florida Supreme Court recounted in its opinion below:

> Bush's counsel, Michael Carvin, in the prior Oral Argument in *Palm Beach Canvassing Board* v. *Harris*, in arguing against allowing manual recounts to continue in the protest phase, stated that he did not
>
> > think there would be any problem in producing...that kind of evidence in an election contest procedure...instead of having every court in Florida resolving on an ad hoc basis the kinds of ballots that are valid and not valid, you would be centralizing the factual inquiry in one court in Leon County. *So you would bring some orderliness to the process, and they would be able to resolve that evidentiary question.*

Slip op. 6 n.7 (emphasis added and omitted).

Accordingly, on November 27, 2000, following the certification of Governor Bush as the winner of the Presidential election in Florida, Vice President Gore followed petitioners' recommended course of action and commenced this election contest action under Section 102.168 in Leon County Circuit Court. The complaint raised five claims:

(1) it challenged the rejection of 215 net legal votes for respondent Gore identified by the Palm Beach County Canvassing Board that had been excluded from the certified vote totals, Complaint ¶¶ 3(a), 60;

(2) it challenged the rejection of 168 net legal votes for Vice President Gore identified by the Miami-Dade County Canvassing Board also excluded from the certified vote totals, *id.* at ¶¶ 3(a), 37;

(3) it challenged the inclusion in the certified totals of the election night returns from Nassau County in place of the machine recount tabulation required by Fla. Stat. § 102.141 to be used to determine the certified totals, *id.* at ¶¶ 3(b), 41;

(4) it argued that the court should review approximately 9000 Miami-Dade County ballots that were not counted by the machines,[1] because – among other reasons – review of approximately 2000 similar ballots by the county canvassing board yielded nearly 400 legal votes, *id.* at ¶ 3(d); and

(5) it challenged the rejection of 3300 legal votes in Palm Beach County during the county canvassing board's manual recount. *Id.* at ¶ 3(c).

Following a two-day trial, the circuit court entered judgment for petitioners and the other defendants on all claims. Final Judgment Order, Sauls, J. (Dec. 4, 2000). Three of the circuit court's determinations were relevant to its refusal even to examine the 9000 Miami-Dade County ballots that were introduced into evidence during the trial. First, the court held that the ballots should not be reviewed because the Miami-Dade County Canvassing Board did not abuse its discretion in terminating its manual recount pursuant to Section 102.166. Tr. of Ruling, Sauls, J. (Dec. 3, 2000), at 10. Second, the court held that respondent Gore was required to establish a "reasonable probability that the results of the election would have been changed" before the court

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[1]These ballots are often called "undervotes." Tr. Contest Trial at 180 (Dec. 2, 2000). They are ballots which have not been counted as votes for President, notwithstanding that on visual inspection they may evidence a voter's intent to cast a vote for President.

could review the ballots and that respondent Gore had failed to carry that burden. *Id.* at 9. And third, the court held that, in an election contest action, the court may not review only the contested ballots but rather must review all ballots cast or no ballots at all. *Id.* at 12.

The Florida Supreme Court affirmed in part and reversed in part. The court affirmed the judgment regarding both the ballots from Nassau County and the rejection, after review, of 3300 ballots by the Palm Beach County Canvassing Board. Slip op. at 33, 35. The court reversed, however, as to the exclusion of ballots which the Palm Beach and Miami-Dade Canvassing Boards had determined to represent valid votes, holding that valid ballots may not be disregarded in an election contest simply because they were not identified prior to the close of the county certification process. *Id.* at 35. Most significant for present purposes, the court held that respondent is "entitled to a manual count of the Miami-Dade County undervote," but also that the Florida Election Code authorized as an appropriate remedy "a counting of the legal votes contained within the undervotes in all counties where the undervote has not been subjected to a manual tabulation." Slip op. at 2; see *id.* at 28-32, 38-40.

Mindful of the impending deadline for resolution of the contest action contained in the safe harbor provision of 3 U.S.C. § 5, the court reversed with instructions to the circuit court to "commence * * * tabulation of the * * * ballots immediately." Slip. op. at 39. On remand, after the Florida Supreme Court's decision, the state circuit court conducted a hearing – the very same evening – to establish practical guidelines and judicial supervision of the process to ensure the fairness of the recount. In election contest actions, the Florida Legislature has specifically conferred this judicial authority to "fashion such orders as [the court] deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." Fla. Stat. § 102.168(8). The circuit court exercised that authority here to establish orderly procedures

for a statewide manual count of undervotes throughout Florida. Tr. of Hearing Before the Hon. Terry Lewis (Dec. 8, 2000); Order on Remand (Dec. 9, 2000).

As to the roughly 9000 undervotes (ballots for which the machine did not record a vote) in Miami-Dade County, the circuit court established the following procedures: (1) beginning at 8:00 a.m. Saturday, the Miami-Dade County undervote ballots would be reviewed in the Leon County Public Library by the Supervisor of Elections of Dade County, in consultation with the Supervisor of Elections in Miami-Dade County; (2) the Supervisor would be permitted to rely on the Clerk of the Court and his staff; (3) two judges from the Second Judicial Circuit would oversee the counting teams; (4) those two judges would be directed to resolve any dispute about ballots; (5) if those judges could not resolve the dispute, Judge Lewis would resolve the dispute; (6) one person for the Democratic Party and one person for the Republican Party would be permitted to observe the count; (7) oral objections would not be permitted, but would be required to be reduced to writing and submitted to the state circuit court; (8) the counting room would be open to the public and the press; and (9) the circuit court would aim to complete the count by 2:00 p.m on Sunday. Lewis Hrg. Tr. 1-8; Order on Remand 1-2.

As for the other counties, the circuit court established the following guidelines: (1) only "undervotes" would be reviewed; (2) the Canvassing Boards would be directed to implement procedures for manually counting the votes, just as they have traditionally done under existing Florida law; (3) judges from throughout the State could be requested to help resolve disputes that might arise during the recounts; (4) by 12:00 p.m. Saturday, December 9, 2000, the County Canvassing Boards would be requested to fax their plans, protocols, and estimated time schedules to the Leon County Court administrator for the court's review; and (5) the Boards would aim to complete their work by 2:00 p.m. Sunday. Lewis Hrg. Tr. 1-8; Order on Remand 2-3.

The circuit court applied the Florida Supreme Court's holding that the counting teams were to follow the traditional legal

standard under Florida law, as set forth by the Supreme Court, for determining whether a valid vote has been cast. In short, the circuit court's guidelines set forth a conventional, uniform process for implementing the court-ordered counting of votes in accord with the Florida Legislature's designated manner of conducting elections. The procedures put in place promise to produce a full, fair, and accurate statewide count of the undervote in accordance with the Florida Supreme Court's ruling that faithfully implemented the applicable provisions of Florida's Election Code, which unambiguously provides for judicial determination of election contests. See Fla. Stat. § 102.168.

By Order of December 9, 2000, this Court granted a stay halting the ongoing counts. The Court also treated the Stay Application as a Petition for Certiorari, which it granted.

SUMMARY OF ARGUMENT

This Court should immediately vacate its stay and affirm the Florida Supreme Court's judgment.

I. The Florida Supreme Court's decision is fully consistent with Article II, § 1, cl. 2. Petitioners' primary argument to this Court – which is flatly contrary to petitioners' position in the Florida courts – is that the mere assertion of appellate jurisdiction by the Florida Supreme Court violated Article II, § 1, cl. 2. This argument lacks merit because Article II, § 1, cl. 2 presupposes the existence of authority in each state to structure the internal processes and organization of each of its governmental branches; judicial review and interpretation of Florida's election statutes is a necessary legislative assumption. In any event, the Florida Legislature *itself* drafted, proposed, and approved through bicameral passage the very provisions of its constitution that provide for appellate jurisdiction. The grant of jurisdiction contained in those provisions, as much as an ordinary Florida statute granting courts jurisdiction, thus was accomplished by the Legislature. Further, petitioners' newfound argument is also foreclosed by this Court's longstanding precedents. See, *e.g.*, *Smiley* v. *Holm*, 285 U.S. 355 (1932); *State ex rel. Davis* v.

Hildebrant, 241 U.S. 565 (1916); *McPherson* v. *Blacker*, 146 U.S. 1 (1892).

In addition, petitioners' pejorative characterizations of the Florida Supreme Court's decision are unfounded and highly irregular. In its ruling, the Florida court did not "make law" or establish any new legal standards that conflict with legislative enactments. Rather, the court engaged in a routine exercise of statutory interpretation that construed the Florida Election Code according to the Legislature's designated "manner" for choosing electors in a statewide election. See Fla. Stat. § 103.111.

II. Petitioners' argument under 3 U.S.C. § 5 is insubstantial. It is not at all apparent how petitioners' current incarnation of this argument even raises a federal question: it is clear – and not now contested by petitioners – that 3 U.S.C. § 5 simply establishes a safe harbor for States that wish to make use of it. There is no dispute here about the meaning of 3 U.S.C. § 5. And there can be no doubt that the Florida Supreme Court was attentive to the terms of the statute and took into account the relevance of 3 U.S.C. § 5 in determining the intent of the Florida Legislature. In any event, nothing in the decision below even remotely creates "new law" in a manner that runs afoul of the terms of 3 U.S.C. § 5, or that affects Florida's entitlement to that provision's safe harbor. The court engaged in a perfectly ordinary exercise of statutory construction, and it surely cannot be the case that the law "changes" when a jurisdiction's highest court settles the meaning of state law. In fact, because the circuit court's decision departed from the plain language of the Florida Election Code, under petitioners' theory reversal of the judgment below will deprive Florida's electors of the safe harbor of Title 3.

III. Finally, the Florida Supreme Court's judgment is fully consistent with equal protection and due process. Until now, petitioners have steadfastly taken the position before the Florida courts that, consistent with settled Florida law, a contest action is the proper means by which respondent should challenge the vote count in this election. It is inconsistent for them now to object to the very contest procedure they previously endorsed.

Moreover, contest actions under Florida law relate only to the ballots which one side or the other contests – virtually every Florida election contest case involves a small fraction of the votes cast in the contested election.

In any event, the Florida Supreme Court's order to review the ballots from Miami-Dade County is consistent with established state law. The Florida Supreme Court's order of a manual tabulation of ballots that were recorded as "no votes" is also consistent with state law. Nor does the "voter intent" standard set by Florida law violate the Equal Protection Clause.

The Florida Supreme Court has ordered not the "selective" recount of which petitioners have complained but a *statewide* recount of all uncounted ballots in every Florida county that had not already completed a manual recount. Indeed, the Florida Supreme Court expressly *granted* petitioners the relief they sought with respect to a statewide recount; petitioners are in no position to complain about a point on which they prevailed.

Petitioners' allegations about the manner in which they say the manual counts have been conducted have no support in the record and are based on unsubstantiated rumors, untested "evidence," and biased ex parte submissions. In fact, the recounts have been conducted in full public view by counting teams made up of representatives from different political parties, with the supervision of a three-member canvassing board that includes a sitting county judge and review by the Florida judiciary. The circuit court developed lengthy and detailed guidelines to ensure uniformity and accuracy. If there are anecdotal instances of isolated mistakes or inaccuracies during recounts, petitioners have ample remedies available to them under Florida law and Florida procedure to secure full redress. In the end, petitioners' argument amounts to a charge that the system of manual recounts, expressly authorized by Florida statute and previously used in innumerable instances over the years by Florida (and States throughout the country), is unconstitutional on its face. Such an ambitious and far-reaching claim has no legal support whatsoever.

The judgment should be affirmed. Because of the pressing need to complete the counting of votes, we ask that the stay be lifted immediately.

ARGUMENT

I. Article II Provides No Basis to Override the Florida Supreme Court's Decision.

Petitioners contend that the Florida Supreme Court's decision "established new standards * * * that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution." Stay App. at 2 (Question Presented 1).

Six days ago, in *Bush* v. *Palm Beach County*, No. 00-836, 531 U.S. __ (U.S. Dec. 4, 2000) (per curiam), this Court addressed a claim put forward by petitioner Bush that the decision of the Supreme Court of Florida in *Harris* v. *Palm Beach County* under the Florida Election Code's protest provision (Fla. Stat. § 102.166) ran afoul of this same constitutional provision. Petitioner there argued that "Article II precludes judicial lawmaking." See Bush Br. in *Palm Beach County* at 46. In particular, petitioner Bush relied upon *McPherson* v. *Blacker*, 146 U.S. 1, 35 (1892), for the proposition that, in interpreting state statutes relating to the appointment of electors, the Florida court had run afoul of the provision of the U.S. Constitution giving the state legislature the power to determine the manner of appointment of electors. Petitioner Bush argued that the infirmity in the *Harris* decision was that the Florida court's construction of the provisions concerning certification of election results did not rest on "any statute." Bush Br. in *Palm Beach County* at 47. Petitioner Bush did not suggest that the Florida Supreme Court was disabled from exercising appellate review in that case – even though the protest provision of Section 102.166 (unlike the contest provision of Section 102.168) makes *no reference at all* to judicial review by any Florida court. Nonetheless, petitioner Bush freely acknowledged that the Florida Court could issue "directive[s] founded in pre-existing law." Bush Br. at 48. "Petitioner has

never contended that state courts * * * are precluded by Article II from construing laws relating to elections." Bush Reply Br. in *Palm Beach County* at 9 n.6.

This much was common ground about Article II underlying this Court's per curiam opinion in *Palm Beach County*. This Court, of course, "decline[d] * * * to review the federal questions asserted" by petitioner Bush "to be present." Slip op. at 6. It did so because there was "ambiguity" about "the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the Legislature's authority under Art. II, § 1, cl. 2." *Id.* at 7. Specifically, this Court could not determine whether the Florida court intended that its conclusions rest solely upon traditional canons of statutory interpretation, or depended upon the state constitution as an independent and overriding source of law.[2] Indeed, this Court *exercised* jurisdiction by vacating the judgment below. See *id.*

1. Recognizing that they have no good claim under the Article II theory presented to this Court just six days ago, petitioners now put forward a radical new proposition in the name of Article II: that the highest appellate court of the state may not exercise its ordinary appellate jurisdiction over decisions of lower state courts where its *jurisdiction* is granted by the state constitution rather than in legislation dealing specifically with presidential elections.

Even apart from the absurd theory that *McPherson* requires everything relevant to a state's process for choosing electors to be

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[2] See *id.* at 5 ("There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.' The opinion states, for example, that 'to the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no "unreasonable or unnecessary" restraints on the right of suffrage' guaranteed by the state constitution. App. to Pet. for Cert. 30a. The opinion also states that 'because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote . . . .' *Ibid.*").

packed into a specialized presidential electoral code, the very premise of petitioners' argument is fatally flawed because the Florida Legislature re-enacted the contest statute in 1999 against the settled background rule that decisions of circuit courts in contest actions are subject to appellate review. See, *e.g.*, *Beckstrom* v. *Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998); *Harden* v. *Garrett*, 483 So. 2d 409 (Fla. 1985); *Bolden* v. *Otter*, 452 So. 2d 564 (Fla. 1984); *McPherson* v. *Flynn*, 397 So. 2d 665 (Fla. 1981). "It is an elementary principle of statutory construction that in determining the effect of a later enacted statute, courts are required to assume that the Legislature passed the latter statute with knowledge of the prior existing laws." *Romero* v. *Shadywood Villa Homeowners Ass'n*, 657 So. 2d 1193, 1195-96 (Fla. Dist. Ct. App. 1995). Under Florida law, therefore, in referring to the "circuit court" in Section 102.168, the Legislature necessarily intended to encompass the ordinary accouterments of appellate review of circuit court decisions. Cf. *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Under Florida law, legislative provisions granting jurisdiction to the Circuit Court, without any express limitations, are always taken to include appellate review. See, *e.g.*, *State* v. *Sullivan*, 116 So. 255 (Fla. 1928); *Cote* v. *State*, 760 So. 2d 162 (Fla. Dist. Ct. App. 2000), *rh'g denied* (May 8, 2000). It accordingly is no surprise that the Legislature filed an *amicus* brief in this Court in the *Palm Beach County* matter that expressly recognizes the jurisdiction of the state's Supreme Court. Br. of Florida Senate & House of Representatives, No. 00-836, *Bush* v. *Palm Beach County Canvassing Board*, at 9 ("Florida has in place an election code for the resolution of disputes and a court system, *including a Supreme Court*, with the usual judicial powers of such courts." (emphasis added)). Thus, the statute itself supplies the necessary authority for review here.

Even petitioners do not try to explain why the Legislature would have wanted to endow a single circuit judge with final authority to decide these cases. Instead, all indications are that the Legislature intended this statute to be governed by the settled

principle of Florida law that the state supreme court has appellate jurisdiction over all matters determined in the lower courts unless the Legislature expressly precludes such review. See, *e.g.*, *Leonard* v. *State*, 760 So. 2d 114, 118 (Fla. 2000) (Florida statutes are traditionally construed to preserve judicial review "rather than limiting the subject matter of the appellate courts"). That, of course, is a principle with which the Florida Legislature is quite familiar.

2. In any event, it is plain that Article II would not have been implicated at all had the court below premised its jurisdiction on the Florida Constitution, because Article II, § 1, cl. 2 presupposes the existence of authority in each state to structure the internal processes and organization of each of its governmental branches; and because, in any event, the Florida Legislature *itself* drafted, proposed, and approved through bicameral passage the very provisions of its constitution that provide for appellate jurisdiction. The grant of jurisdiction contained in those provisions, as much as an ordinary Florida statute granting courts jurisdiction, thus was accomplished by an act of the Legislature, and nothing in Article II, § 1, cl. 2, requires that all the provisions bearing on the selection of presidential electors be located exclusively in a separate statute devoted solely to that end – even assuming that a legislature, exercising its power under Article II, could by express provision eliminate judicial review for any contests arising out of the choice of Presidential electors, or confine that review to the final determination of trial judges. The issue here is whether the Florida legislature has done that. It has not.

Under Florida law, an amendment or revision to the state constitution may be undertaken "by joint resolution agreed to by three-fifths of the membership of each house of the legislature." Fla. Const. art. XI, § 1. Pursuant to that method, the Legislature drafted, proposed, and approved the constitutional provision that confers jurisdiction on the state supreme court. See Fla. Const. art. V, § 3(b). That provision originated as a Senate Joint Resolution and was approved by concurrent votes of both houses

of the state legislature in 1971. See S.J.R. No. 52-D (1971). It was ratified by Florida's voters in 1972. See West's Fla. Stat. Ann., Fla. Const. art. V. The relevant jurisdictional provisions of the constitution were further revised, again at the proposal and on the vote of both houses of the Florida Legislature, in 1980. See S.J.R. No. 20-C (1980); West's Fla. Stat. Ann., Fla. Const. art. V (historical notes).

This process plainly satisfies any Article II requirement that contests regarding presidential electors proceed under rules devised by the state legislature. That it was contained in a measure not dedicated to the presidency and the Electoral College as such is without constitutional significance. Petitioners could not respond to this seemingly self-evident point by arguing that nothing but state "legislation," and perhaps state "electoral college legislation," is contemplated by Article II. That provision's plain terms mandate only that a State's electors be appointed "in such Manner as the Legislature" thereof may direct; it does not require that the legislature must act by enacting a bill into law, as opposed to other means of direction. Indeed, this Court has so held. See *McPherson* v. *Blacker*, 146 U.S. 1, 29 (1892).[3]

Nor is this conclusion undermined by the fact that state constitutional provisions in Florida, after proposal and passage by the Legislature, are ultimately ratified or adopted by the voters. Indeed, this Court has squarely held that the analogous constitutional provision in Article I, § 4, which vests state legislatures with the power to prescribe the manner for selecting representatives to Congress, is consistent with a legislative exercise of authority made subject to popular referenda. See *State ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916). By the same token, state legislation – which petitioners insist *must* govern presidential election disputes – is passed by the Legislature but

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[3] Of course, it is common ground that the means chosen by the legislature are subject to constraints imposed by other provisions of the federal Constitution, for example, Article II, § 1, cl. 4, and the Fourteenth Amendment.

takes effect only when approved by the *governor*. It is beyond peradventure that the presence of this part of the state lawmaking scheme does not violate a constitutional delegation to the state "Legislature," even when the executive power is used to *veto* legislation adopted by the Legislature. See *Smiley* v. *Holm*, 285 U.S. 355 (1932) (delegation to each State's "Legislature" in Art. I, § 4 of the authority to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, does not preclude the State's governor from vetoing a state congressional reapportionment law). The point therefore seems inarguable: in exercising jurisdiction in this case, the Florida Supreme Court acted in precisely the "[m]anner" directed by the Legislature.[4]

Petitioners appear to argue that, under *McPherson*, the jurisdiction of the state supreme court may not be premised on the Florida Constitution because the U.S. Constitution "does not permit state constitutions to override a state legislature's selection of the manner of choosing electors." Stay App. at 25. But at most this case involves *interpreting* a state legislature's mode of selection, not *overriding* it. Moreover, in *McPherson*, the Court in that case noted, without question, that the Colorado Constitution of 1876 "prescribed" the selection of electors by the legislature of the newly admitted State. 146 U.S. at 33. Further, an 1874 Senate report quoted in *McPherson* referred to the appointment of electors as provided in a state constitution. See *id.* at 35 ("Whatever provisions may be made by statute, *or by the*

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[4] Although it is not directly relevant here, we note that the same principles govern application of Art. I, § 1 of the Florida Constitution, which was at issue in *Palm Beach County*. That provision also was approved by the Legislature and presented to the voters as part of a significant constitutional revision and re-enactment in 1968. See *Florida Soc'y of Opthalmology* v. *Florida Optometric Ass'n*, 489 So. 2d 1118, 1122 n.2 (1986) (Ehrlich, J., specially concurring); Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission*, 52 FLA. L. REV. 475, 476 n.8 (2000). At the time of that action, the Legislature surely was aware that the provision had long been understood to emphasize the importance of the right to vote. See, *e.g.*, *State* v. *Bird*, 163 So. 248, 252 (Fla. 1935).

state constitution, to choose electors by the people, there is no doubt of the right of the legislature * * * ." (emphasis added)).

Even under the most aggressive reading of *McPherson*, however, petitioners' argument is insubstantial.[5] As the Court indicated in *Palm Beach County*, *McPherson* might be read to suggest that it is impermissible for a state constitution to "circumscribe the legislative power" regarding the process for selecting electors. 146 U.S. at 25. Whatever might be the rule where a state constitution was not passed by the state legislature, here, far from "circumscrib[ing] the legislative power," the Legislature *itself*, as noted above, proposed and passed the state constitutional provision that petitioners insist governed this action. And it surely cannot be the case that Article II of the U.S. Constitution *precludes* state legislatures from using state constitutional mechanisms to resolve controversies concerning electors, if that is the "[m]anner" of appointment that the legislature "direct[s]." Indeed, any such rule of preclusion necessarily would run afoul of petitioners' *own* reading of Article II, under which legislatures have *carte blanche* in determining the manner of appointment. Article II cannot be read to swallow itself.

Nor is this even a case where a constitutional provision initially promulgated by the Legislature was later asserted to *prevent* enforcement of a state statute, which was the issue raised by this Court's *Palm Beach County* opinion. Nothing of the sort is going on here. To the contrary, Article V of the Florida

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[5] And, indeed, were it the proper reading, this Court would not have remanded in *Palm Beach County*. In that case, the Florida Supreme Court expressly relied on Article V of the Florida Constitution as the basis for its jurisdiction. See Slip op. at 5. This Court did not express any concern about the Florida court's exercise of its appellate jurisdiction in that case. Rather, it said that it could not precisely determine the "grounds for the decision" below. See *Palm Beach County Canvassing Board*, Slip op. at 6 (internal quotation marks and citation omitted). If this Court had thought that the mere exercise of jurisdiction under a state constitution was improper, it would not have had to remand the case for clarification.

Constitution and Fla. Stat. § 102.168 are entirely consistent with one another – and there is every reason to believe that the Legislature intended and expected that participants in election contests would make use of the appeals process as a means of clarifying, interpreting, and enforcing the laws. Under petitioners' own approach, then, Article II of the U.S. Constitution *requires* that the right to appeal put in place by the Florida Legislature must govern here.

Finally, petitioners' argument is directly refuted by *State ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), in which this Court held that Article I, § 4, allowing States to prescribe the manner in which representatives to Congress are elected, does not preclude the state supreme court from exercising jurisdiction over such matters even though that jurisdiction is premised squarely on the state constitution. *Id.* at 568-70. This precedent completely undercuts petitioners' argument that the Florida Supreme Court, by invoking its jurisdiction under Article V of the Florida Constitution, is completely disabled from playing its ordinary role as the highest court of the state when questions arise concerning the laws that relate to the appointment of electors. Indeed, *McPherson* itself was an original mandamus action in the Michigan Supreme Court. See 52 N.W. 469, 470, *aff'd*, 146 U.S. 1 (1892). This Court affirmed on the merits.[6]

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[6] In any event, this argument was not properly raised below. At oral argument, petitioners' counsel conceded in response to direct questioning that the Florida Supreme Court had jurisdiction in this case, despite Article II. After argument, petitioners filed an untimely "clarification of argument" that was not accepted by the Court below. Even in that filing, petitioners did not argue, as they do here, that Article II disabled the Florida Supreme Court from exercising appellate jurisdiction. To the contrary, they said only that the "relief" sought by respondent was barred by Article II. See Bush Clarification at 2-3.

This is an appeal from a state court judgment, under 28 U.S.C. § 1257. That statutory authority prevents this Court from deciding federal constitutional claims that are raised for the first time before it in appeals from state court decisions. See *Adams* v. *Robertson*, 520 U.S. 83, 88 (1997) (per curiam); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-39 (1969).

3. Even if the Florida Supreme Court's authority were thought to stem only from the Florida Constitution, not the statute, and even if that constitution had not been enacted by the Legislature, exercise of that authority still would not violate Article II.

a. To begin with, the theories put forward by petitioner Bush in *Palm Beach County* and here are based on misreadings of Article II and of this Court's precedents. Should the Court in this case reach the issue reserved in *Palm Beach County*, it should conclude that a state court need not avoid use of the state constitution in construing legislation.

The state courts would be strange places indeed if Article II disabled them, in construing statutes enacted pursuant to constitutional grants of power to the "Legislature," from placing any reliance on state constitutions. The only authority cited by petitioners for that proposition, *McPherson* v. *Blacker*, actually supports the opposite conclusion: that the state courts, in interpreting state statutes enacted pursuant to the delegation of authority in Article II, *may* rely on all the sources of law they ordinarily bring to the task of interpreting state laws.

McPherson does state in dictum that the delegation to the legislature in Article II "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." 146 U.S. at 25. And undoubtedly it is true that, except by action of the legislature, the State could not purport to vest the power to direct the manner of the appointment of electors in any other body

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Before a claim may be considered here on appeal, it must "'be brought to the attention of the state court with fair precision and in due time.'" *Street* v. *New York*, 394 U.S. 576, 584 (1969) (quoting *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928)). This rule is mandated by principles of federalism that require respect for state courts which have acted in complete good faith in reaching decisions that may involve questions of federal law. In this case, petitioners were asked at oral argument, directly and repeatedly, whether Article II disabled the court below from adjudicating the appeal and they insisted that it did not. They *never departed from that position* before the Florida Supreme Court, even in their untimely post-argument submission.

or individual.

But *McPherson* makes equally clear that, once a state legislature has enacted laws in exercise of its power to direct the manner of appointment of electors, the state courts may interpret those laws precisely as they would any other state legislative enactment. The Court's opinion explains that state statutes and the state constitution may be used by state courts in determining the precise scope of the right to vote for electors when such a right is conferred by state legislation. "Whenever presidential electors are appointed by popular election * * * [t]he right to vote [granted thereby] * * * refers to the right to vote as established by the laws *and constitution* of the State." 146 U.S. at 39 (emphasis added). Indeed, in *McPherson* itself, the state supreme court below had measured the statute providing for the appointment of electors for conformity with "the state constitution and laws," and this Court concluded that it was "not authorized to revise the conclusions of the state court on these matters of local law." *Id.* at 23. This very conclusion is enough to dispose of petitioners' basic Article II claim: the state courts are not disabled from applying their state constitutions when they interpret legislation enacted pursuant to Article II.

Nor does Article II create a "state-constitution-free" zone in a state's law – even assuming it would be possible to pull the thread of state constitutional law out of the fabric of a state's law when administering or adjudicating questions bearing on elections for President and Vice President. State constitutions provide the necessary framework for a wide range of practices necessary to the conduct of elections held for the purpose of appointing electors, including a variety of actions by the executive and judicial branches of state government. Indeed, state constitutions determine the very nature and composition of the state legislature that is given the power to determine the method for the appointment of electors under Article II. Compare Fla. Const. art. III, § 1 (creating a bicameral legislature) with Neb. Const. art. III, § 1 (creating a unicameral one). They impose quorum requirements, qualifications of members, voting standards, and

other rules necessary to enable the legislature to function. See, *e.g.*, Fla. Const. art. III, § 2 (members); *id.* § 3 (sessions); *id.* § 4 (quorum and procedures); *id.* § 7 (passage of bills); *id.* § 15 (qualifications). In a very real sense, the state legislature is a creature of the constitution that creates it, and any attempt to isolate one from the other would give rise to a host of unforeseen practical and legal problems.[7]

b. The threshold inquiry under Article II is whether the state constitution "circumscrib[ed] the legislature's authority," and here the application of the Florida Constitution is fully consistent with Article II because there is every indication that the Legislature intended to provide appellate review in contest actions, not eliminate it.

For example, suppose that the Legislature had enacted a provision stating: "To promote expeditious resolution of election disputes, there shall be no appellate review of the decisions of circuit courts in contest actions." If the Florida Supreme Court had held that provision invalid under the Florida Constitution, an issue would then arise under Article II regarding the validity of the provision for contests of Presidential elections. Here, where the constitutional provision for appellate review merely supplements the Legislature's scheme – much like judicial rules of procedure or evidence or principles of statutory construction – and does not invalidate a choice made by the Legislature, the principle set forth in *McPherson* is not implicated at all. See 146 U.S. at 39-40; see also *id.* at 24-26; *Leonard*, 760 So. 2d at 118 (Florida statutes are traditionally construed to preserve judicial review "rather than

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[7] The absurdity of petitioners' view can be illustrated another way: if a state legislature's "plenary" power over the appointment of Presidential electors cannot be circumscribed by any outside authority (including the state constitution), then it would seem to follow that this Court might well lack jurisdiction to entertain this very case, for Congress would have no authority to confer jurisdiction to review these matters under 28 U.S.C. § 1257.

limiting the subject matter of the appellate courts").[8]

4. Petitioners also raise a claim that the Florida Supreme Court's decision violates Article II because the Court below "over[rode]" the state legislature in its construction of state law. Stay App. at 25-27.

a. To begin with, there is no warrant in Article II, in *McPherson*, or in *Palm Beach County*, for the contention that some statutorily based decisions of state law – those with no "precedent," Stay App. at 25 – violate Article II because they are "legislative" and not "judicial" in character. Here petitioners essentially resurrect – now in Article II guise – the extraordinary *Teague* argument that they made in *Palm Beach County*. Cf. *Teague* v. *Lane*, 489 U.S. 288 (1989). They argue, with absolutely no authority, that "newly announced judicial extensions" of prior precedent in this context, Stay App. at 25, violate the federal constitution.

But even *Teague* does not hold that "new rules" are *legislative* acts. Indeed, under *Teague* "new rules" *may* be announced by this Court on direct review of decisions of the State's highest courts. See, *e.g.*, *Johnson* v. *Texas*, 509 U.S. 350, 352 (1993). Under Article III, the federal courts are provided only with "judicial" authority; separation of powers principles prohibit them from "legislating." Yet, until now, it has never been suggested that these principles mean that federal courts cannot engage in statutory interpretation that amounts to a "newly announced judicial extension[]" of prior law. Petitioners' attack on the judicial function would disrupt state government by crippling the process of legislative interpretation at the time it is needed most.[9]

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[8] More generally, Article I of the Constitution states that "All legislative Powers herein granted shall be vested in a Congress of the United States." Petitioners' argument would seem to mean that this express grant of authority to the Legislature precludes judicial review. That, of course, has never been this Court's view. See, *e.g.*, *United States* v. *Morrison*, 120 S. Ct. 1740 (2000).

[9] The kind of federal superintendence over state court decisions petitioners

In any event, there are no judicial "extensions" involved in the decision below. The Florida Supreme Court employed the substantive standards expressly set out in the Florida contest provision, and the other Florida statutes on which it relied. Indeed, under petitioners' own theory, a reversal of the judgment below and a reinstatement of the circuit court opinion – which declined to use the standards contained in the plain text of the recently enacted amendments to the contest provision – would violate Article II.

A discussion of the particular state law issues cited by petitioners confirms that the decision below is a routine example of statutory construction that is entirely consistent with Article II, and that petitioners' claims are nothing more than an impermissible attempt to persuade this Court to redetermine these state-law issues. Significantly, despite the division on the court below with respect to the relief granted, there was significant consensus with respect to the questions of statutory interpretation: six of the seven justices agreed on the issues of statutory interpretation. Slip op. at 13-20; see also *id.* at 61-63 (Harding and Shaw, JJ., dissenting). Petitioners' contentions before this Court ultimately reduce to empty assertions with little in the way of support.

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would have this Court implement would also turn decisions like *Teague* on their head. *Teague* is animated by principles of federalism and respect for state courts as "coequal parts of our national judicial system." *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990). Petitioners would instead use a limitation on "new" judicial interpretations as a sword by which the federal judiciary, in challenges involving presidential electors, would supervise state courts' application of state law to determine whether those courts correctly discerned and applied local law. Petitioners would have the federal judiciary issue orders – pursuant to state law – regarding the details of state certification and contest procedures whenever the federal courts concluded that the state judiciary departed in any way from pre-existing state statutes. Far from honoring state courts, the standard proposed by petitioners would trigger dramatic federal intrusion into the state judicial process. This result cannot be squared with principles of federalism or with the long history of statutory interpretation by state courts in the post-election context.

First, petitioners claim that the Section 102.168 contest action does not apply to Presidential elections. However, as the Florida Supreme Court explained, Slip op. at 6 n.7, petitioner Bush, the Florida Legislature, and the Florida Secretary of State all took the position before that court that the contest action was available. Indeed, petitioner Bush himself filed a third-party complaint in the circuit court in this case, invoking Section 102.168 with respect to the Presidential election.[10]

In an abrupt about-face, petitioners now suggest that, when a state legislature exercises its "plenary authority" under Article II, it must write specific rules to govern only that unique exercise of authority. This suggestion is both unjustified and unrealistic. If a legislature decides to hold an election to select Presidential electors, it typically assumes that all of the laws, rules, and regulations contained in the state election code will be applicable. And, indeed, all of the States rely on generally applicable provisions of their election laws in carrying out their periodic responsibility of selecting electors for President and Vice President.

Second, petitioners assert that the court below "essentially overruled" two subsections of Section 102.166 by ordering a recount of less than all of the ballots cast. However, as the Florida Supreme Court explained, the Section 102.166 protest remedy is entirely separate from the Section 102.168 contest remedy. Slip op. at 13; see also *id.* at 61 (Harding and Shaw, JJ., dissenting) (agreeing that the two remedies are separate). And whatever the restrictions on the county canvassing boards' authority under Section 102.166, the Legislature expressly granted the courts extraordinarily broad remedial authority in contest actions (see Section 102.168(8)), and it is that authority which is the basis for

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[10] The single case cited by petitioners– *Fladell* v. *Florida Elections Canvassing Comm'n* – was an intermediate appellate decision later vacated by the Florida Supreme Court, which expressly held that "the Court's rulings thereon are a nullity." See *Fladell* v. *Florida Elections Canvassing Comm'n*, Nos. 00-2372 & 00-2376, Slip op. at 4 (Fla. Dec. 1, 2000).

the determination below.

Third, contrary to petitioners' contention, Stay App. at 26, the court below did not rely on the prior opinion that this Court vacated in *Palm Beach County*. It merely pointed out that a canvassing board's failure to complete the recount by the date specified in the court's opinion (which governed protest remedies) did not forever bar any legal votes identified in that recount from being included in the ultimate vote totals (as a possible contest remedy). Slip op. at 34-35. Petitioners' reference to the Broward County votes, Stay App. at 26, is mystifying because the counting of those votes was not an issue in the court below.

Fourth – and somewhat inconsistently – petitioners attack the Florida Supreme Court for refusing to go beyond the statutory standard for a legal vote – the clear intent of the voter, Fla. Stat. § 101.5614(5) – and hold that indented ballots may never constitute legal votes. Stay App. at 27. Here, the court's opinion simply recognizes and faithfully adheres to the statutory test; it is difficult to understand how this fidelity to the legislative enactments of the State could possibly violate Article II. If the court had gone beyond the express statutory provision to provide further guidance, petitioners would presumably have argued that such guidance impermissibly made new law.

b. It must be noted that the federal claim asserted in *Palm Beach County* is completely absent here. There is no indication whatsoever in the lower court's opinion that it "saw the Florida Constitution as circumscribing the Legislature's authority" under the federal Constitution. Indeed, the Florida Supreme Court clearly recognized the limitations imposed by Article II – it expressly acknowledged them at the outset of its opinion. Slip op. at 5 ("These statutes established by the legislature govern our decision today."). Accordingly, no federal question (and hence no basis for reversal) is even presented in this case under *Palm Beach County* or Article II.

Petitioners nonetheless impugn the Florida Supreme Court in general terms, arguing that it violated Article II when it

"substituted its judgment for that of the legislature" and "rewr[ote] th[e] statutory scheme" governing the appointment of presidential electors in various respects. Stay App. at 23.

But here, unlike in *Palm Beach County*, the Florida Supreme Court's opinion makes clear that it did *not* rely upon the Florida Constitution even in *construing* the election law. The court based its interpretation on entirely conventional tools of statutory construction, including statutory text, traditional canons, and relevant precedents; in other words, it engaged in altogether routine statutory interpretation.

Petitioners' argument here thus is either that the Florida Supreme Court deliberately misrepresented the basis for its decision by saying it was interpreting Florida statutory law when it was actually doing something else entirely – or that Florida's highest court seriously erred in interpreting Florida law. Either contention contradicts the "general rule" that "this Court defers to a state court's interpretation of state law." *Palm Beach County*, Slip op. at 4. And, were this Court to adopt petitioners' view of Article II, it would be required to second-guess every state law ruling by a state court bearing in any way on a presidential election to determine whether the lower court was attempting to disguise some other and improper basis for decision or had just gotten the state law wrong.

Nor is petitioners' argument consistent with this Court's decision in *Palm Beach County* in which the Court remanded the case for the Florida Supreme Court's clarification of the basis of that Court's decision.

Finally, as this Court is well aware, the process of statutory construction is the process of determining how to resolve issues that are not conclusively determined by the language of the statute. Unavoidably, petitioners take the position that Article II bars a court from engaging in this routine and obviously essential process: if an issue is not explicitly and unambiguously addressed in the language of the statute or in a prior decision that is precisely on point, then the court has usurped the Legislature's

constitutionally delegated power. Nothing in Article II so limits the courts' authority. Indeed, the fact that the provisions for election contests in Section 102.168 apply broadly to *all* elections confirms the Legislature's intent that the courts are to exercise their usual role as neutral umpires who interpret the law to resolve disputes.

II. The Florida Supreme Court's Decision Is Consistent With 3 U.S.C. § 5.

The Court is by now familiar with petitioners' ever-shifting reading of 3 U.S.C. § 5. First, petitioners maintained that Section 5 was a flat federal prohibition on the determination of election controversies through laws enacted after election day. Pet. for. Cert., No. 00-836, at 4-8. In their merits brief, they subsequently acknowledged that Section 5 on its face constituted only a safe harbor, but urged this Court to infer a broader prohibition as supposedly necessary to effectuate Congress' intent. Br. for Petr. Bush at 17-19, 27-29. Now, they attempt without explanation to convert this Court's direction in the *Palm Beach County* case that state courts should be aware of the safe harbor provided by Section 5 in determining legislative intent, see Stay App. at 29 (quoting *Palm Beach County*, Slip op. at 6), into a jurisdictional basis for this Court to invalidate the Florida Supreme Court's decision, *id.* at 30. Petitioners' argument fails both because Section 5 constitutes only a safe harbor from a challenge in Congress to a state's slate of electors and because the decision below did not constitute a change in Florida law.

1. ***The Florida Supreme Court Was Fully Attentive To The Impact Of Its Decision On The Safe Harbor Of 3 U.S.C. § 5.*** From the outset, the Florida Supreme Court was attentive to Section 5's requirements, consistent with this Court's directive that "a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law." *Palm Beach County*, Slip op. at 6. Thus, the court acted fully "cognizant of the federal grant of authority derived from the United States Constitution and derived from 3 U.S.C. § 5," which statute the

court quoted in full. Slip op. at 5-6. And the court made clear that its decision rests on the contest process set out in Section 102.168, "which laws were enacted by the Legislature prior to the 2000 election." Slip op. at 6.

2. ***The Text And Legislative History Establish 3 U.S.C. § 5 Exclusively As A Safe Harbor.*** Petitioners' attempt to derive a judicial remedy from 3 U.S.C. § 5 conflicts with Congress' avowedly narrow purpose in enacting the statute. As respondent developed at length in his opening brief in the *Palm Beach County* case, see Resp. Br. at 21-30, and as we recount more summarily here, 3 U.S.C. § 5 serves *no purpose* other than to insulate a state's slate of electors from challenge in Congress. Section 5 purports to set out a rule by which the Houses of Congress shall determine which electors for President of the United States from a particular State will be entitled to have their votes counted if more than one return purporting to contain the electoral votes of that State is received by the President of the Senate. Tellingly, Florida's own Legislature, appearing as an *amicus* before this Court in the *Palm Beach County* case, rejected petitioners' broader reading of Section 5.

The statute provides that "if" certain rules are followed by a State in making its "final determination of any controversy or contest concerning the appointment of all or any of the electors of such State * * * such determination * * * shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5. The regulation "hereinafter" to which the statute refers is 3 U.S.C. § 15, which announces a rule by which the Houses of Congress will decide which electors' votes are to count when the President of the Senate receives "more than one return or paper purporting to be a return from a State." 3 U.S.C. § 15. In such a case, Section 15 provides that "those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the

determination in said section provided for shall have been made." *Id.*

The legislative history of 3 U.S.C. § 5 confirms the understanding that it is focused exclusively on Congress and provides only an option. That history establishes conclusively that the statute's only purpose and effect is to provide each State with a way to guarantee that its electors will not be subject to challenge in Congress at the time the electors' votes are tabulated pursuant to the Twelfth Amendment.[11] Indeed, supporters of the bill took great care to address and refute without contradiction precisely the construction of Section 5 that petitioners now erroneously press 110 years later. These supporters explained that the statute could not result in the invalidation of a State's votes but provided only a safe harbor against a challenge in Congress to the State's slate of electors. *E.g.*, 15 CONG. REC. 5547 (June 24, 1884) (statement of Rep. Herbert). And Representative Eden made virtually the identical point: "The States are entirely free under the Constitution to adopt the mode of appointment of electors that the legislatures thereof may prescribe. * * * *The bill contemplates no exclusion of electoral votes from the count because of the failure of a State to settle disputes as to the lawful vote of the State.*" 18 CONG. REC. 75 (Dec. 9, 1886) (emphasis added).

Petitioners cannot successfully convert their argument under 3 U.S.C. § 5 into a claim under Article II of the Constitution by maintaining that the Florida Supreme Court overrode the will of the Legislature by taking the state outside the safe harbor of Section 5. The wish to avoid challenge to its electors represents an important indication of a State Legislature's intent, but that wish is not the only one to be taken into account. There is no question, for example, that a state legislature *can* intend to take a State out of the safe harbor to achieve some other objective and a state court's overriding obligation remains to interpret the terms

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[11] As detailed in respondent's opening brief in the *Palm Beach County* case, at 23 & n.14, Sections 5 and 15 were a direct reaction to the Hayes-Tilden matter.

of the statute as the State Legislature enacted it. Under Section 5 as enacted, "Congress does *not* command the states to provide for a determination of the controversies or contests that may arise concerning the appointment of the electors, does not even declare it to be the duty of the states to do so, but *simply holds out an inducement for them so to act.*" John W. Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q. 633, 635 (1888) (emphasis added); see also Paul L. Haworth, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876, at 305-06 (1906) (law "provides that a state may finally determine every contest connected with the choice of electors, but that such determination must be made in accordance with a law passed before the electors are chosen and that the decision must have been made at least six days before the meeting of the electors. Where such a determination has been made, it must be accepted * * * ."). The legislative history specifically reflects a recognition that a State was free not to take advantage of Section 5's safe harbor, with the only implication being that the State's electors would be subject to challenge in the Congress. *E.g.*, 18 CONG. REC. 30 (Dec. 7, 1886) (report by Select Committee on the Election of President and Vice President, accompanying Senate Bill 9).[12]

3. The Decision Below Does Not Change Florida Law And Therefore Does Not Affect Florida's Entitlement To The Safe

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[12] If there remains any ambiguity about the appropriate reading of Section 5, it should nonetheless be interpreted as only a safe-harbor provision in order to avoid constitutional questions under Article II and settled principles of federalism. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). A congressional attempt to rearrange the constitutional structure of state government – for example, by purporting to preclude judicial involvement in state election disputes that the state has sought through its own constitution and laws to provide – is one of the few sorts of intrusion upon state sovereignty that might well be unconstitutional even after this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). See *id.* at 556 (citing *Coyle* v. *Oklahoma*, 221 U.S. 559 (1911)) (invalidating a congressional attempt to relocate a state capital).

Harbor Of 3 U.S.C. § 5. Petitioners err in asserting that the Florida Supreme Court's decision "makes new law" in numerous respects.[13] First and foremost, the decision below is in all respects entirely with longstanding Florida election law. *E.g.*, *Beckstrom* v. *Volusia Cty. Canvassing Board*, 707 So. 2d 720 (Fla. 1998); *Boardman* v. *Esteva*, 323 So. 2d 259 (Fla. 1975); *State ex rel. Peacock* v. *Latham*, 170 So. 819 (1940), 170 So. 309 (1936), 170 So. 472 (1936); *State ex rel. Nuccio* v. *Williams*, 97 Fla. 159, 120 So. 310 (1929); *Darby* v. *State*, 73 Fla. 922, 75 So. 411 (1917).

Second, petitioners assert that the decision below conflicts with a 1992 Florida appellate decision describing the discretion of a canvassing board to hold a manual recount in a protest proceeding. Stay App. at 30 (citing *Broward County Canvassing Bd.* v. *Hogan*, 607 So. 2d 508, 510 (Fla. Dist. Ct. App. 1992)). The cited decision is inapposite. First, the case now before this Court involves a *contest* rather than a protest; the two election schemes (Fla. Stats. §§ 102.166 &102.168) are distinct. Second, in the present case Miami-Dade County made the decision to commence a manual recount, and the same court that decided *Hogan* held that completing the recount was "mandatory." Even if that single decision were in point, the decision of the Florida Supreme Court – a superior tribunal – on an issue of statutory interpretation could hardly be deemed a sufficient change in the law that Congress would have intended the state's electors to lose their presumed validity. Indeed, the contrary view would conflict with settled principles of judicial hierarchy by binding the Florida Supreme Court to follow the decisions of the inferior courts in such matters.

Third, petitioners make the related argument that the Florida Supreme Court's decision "effectively announc[es] a new standard

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[13] Given the nature of the briefing in this proceeding, in which respondent apparently will have no opportunity to address issues raised for the first time in petitioners' brief, it is of course essential that petitioners' arguments on the merits be constrained to those raised in their application for a stay.

that manual recounts are *required* in cases of claimed voter error." But petitioners do not even attempt to offer a page reference for this gross misreading of the decision below, which carefully explains that the statute requires one contesting an election to make a threshold showing that a sufficient number of legal votes have been rejected to place in doubt the outcome of the election. Slip op. at 22-23. Indeed, under petitioners' theory of 3 U.S.C. § 5, reversal of the Florida Supreme Court's judgment and reinstatement of the decision of the circuit court would deprive Florida of the safe harbor. As six of the Florida Justices agreed, the circuit court failed to use the standards included in the statute on November 7, 2000. And petitioners' challenge to the Florida Supreme Court's order directing manual recounts in each county – without regard to the counties' discretion – is entirely disingenuous: it was *petitioners* who argued that a statewide recount would be required in the event that respondents' contest of the 9000 uncounted Miami-Dade ballots was sustained. See Amended Brief of Appellees Bush and Cheney, in *Gore* v. *Harris*, Fla. S. Ct. No. SC00-2431, at 43 ("In a contest of a statewide election, a statewide recount is required by the Equal Protection Clause of the U.S. Constitution and Florida Statute Section 102.168.").

Fourth, petitioners allege that the Florida Supreme Court changed the law by adopting a statewide standard requiring that "dimpled" ballots be counted in recount proceedings. Stay App. at 31. Of course, petitioners neglect to reconcile that contention with their due process and equal protection theories that the court's decision is unconstitutional because it supposedly *fails* to adopt standards for determining voter intent. We address the standard set-forth by the Legislature and applied by the courts in this case *infra*, but it is enough to note here that petitioners do not even claim that the Florida Supreme Court's decision conflicts with any prior court decision or, more to the point, with any legislative enactment in this respect.

Petitioners' examples are most useful, we think, in demonstrating how their theory would require constant federal

judicial superintendence over state procedures and state court rulings in Presidential elections. Federal judges would be called on to examine supposed inconsistencies between different rulings in a never-ending search for what law really is "new" and what law is "old." Indeed, petitioners' argument that courts faced with an election controversy may not provide an "answer * * * created after Election Day," Stay App. at 32, would seriously distort the normal application of state election laws, given the necessarily retroactive nature of judicial decisionmaking. See *Harper* v. *Virginia Dep't of Taxation*, 504 U.S. 86 (1993). And federal courts would apparently scour the text of state court decisions for clues that state judges had applied state election laws to new circumstances – which until this case had long been regarded as a principal responsibility and virtue of state judiciaries, not a federal constitutional vice. Nor would the federal inquiry be limited to the state courts, for petitioners maintain that the safe harbor of 3 U.S.C. § 5 evaporates upon a mere change in ballot procedures by a *single county canvassing board*. See Stay App. at 32 (asserting violation of Section 5 based on supposed change in Palm Beach County's treatment of "dimpled" ballots: "This change in policy by the organ of government granted the authority to conduct manual recounts fails to satisfy 3 U.S.C. § 5's express requirement that controversies be resolved pursuant to law as it exists prior to election day."). Yet some such adjustments must occur repeatedly in every state in every election. It is simply not credible to suggest that this everyday state of affairs regularly operates to eliminate the protections of safe-harbor provisions.[14]

Petitioners' argument is thus inconsistent with the longstanding practice of state courts, as well as attorneys general, to interpret and construe state election statutes as necessary to

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[14] Indeed, every time a court interprets a state election statute for the first time in the context of a Presidential election, it presumably makes "new" law in petitioners' view, thereby stripping the state of the safe harbor afforded by Section 5.

resolve post-election disputes.[15] Florida courts have routinely engaged in post-election statutory interpretation. See, *e.g.*, *State ex rel. Peacock* v. *Latham*, 170 So. 475, 478 (Fla. 1936); *State ex rel. Knott* v. *Haskell*, 72 So. 651 (Fla. 1916); *State ex rel. Drew* v. *McLin*, 16 Fla. 17 (1876). The range of settled practices that would be drawn into question by petitioners' argument, or that would draw the availability of the 3 U.S.C. § 5 safe harbor into question, is little short of staggering.

III. The Fourteenth Amendment Affords No Basis for This Court to Set Aside Florida's Established Statutory Proceedings for Determining the Proper Outcome of the Election.

A. There Is No Violation of the Equal Protection Clause.

Petitioners have pointed to two supposed equal protection problems arising from the remedy ordered by the Florida Supreme Court. First, petitioners contend that the Florida Supreme Court erred by ordering a statewide manual count of undervotes, thereby supposedly discriminating against those whose votes were counted by automated means. Second, petitioners contend that the inclusion for a manual recount of approximately 9000 undervotes from Miami-Dade County caused some votes to be counted twice and others to be counted using standards different from those applied to other Miami-Dade County votes. Supp. Mem. at 2 n.1. Neither allegation has merit.

To begin with, neither of petitioners' claims was raised properly below. It is important to appreciate the narrowness of the Fourteenth Amendment claim raised by petitioners before the Florida Supreme Court: Petitioners argued (in only one throwaway line, no less) that "the application of counting

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[15] See, *e.g.*, *State ex rel. Stephens* v. *Marsh*, 221 N.W. 708 (Neb. 1928); *State ex rel. Dahlman* v. *Piper*, 69 N.W. 378 (Neb. 1896); *Woods* v. *Sheldon*, 69 N.W. 602 (S.D. 1896); Miss. Op. Att'y Gen. No. 1999-0697, 1999 WL 1333481 (Dec. 22, 1999); Tex. Op. Att'y Gen. No. JC-0293, 2000 WL 1515422 (Oct. 11, 2000); Ark. Op. Att'y Gen. No. 94-366, 1994 WL 702001 (Nov. 21, 1994).

standards in different counties as well as the occurrence of manual recounts in only selected counties or selective portions of counties violates the equal protection and due process clauses of the U.S. Constitution." Amended Brief of Appellees George W. Bush and Dick Cheney at 45 (Exh. H to Stay Application). No other Fourteenth Amendment claim was framed.[16]

Petitioners' Fourteenth Amendment arguments rest principally on the assertion that, if the manual count proceeds, similar ballots will be treated dissimilarly in different parts of the State. We note that, insofar as this argument is directed at pre-contest tabulations, it is out of place here; petitioners should have raised such claims in an election contest of their own. But more fundamentally, petitioners' contention simply finds no support in the law, and has sweeping implications for the conduct of elections. The court below was quite insistent that the counting of ballots must be governed by a *single* uniform standard: the intent of the voter must control. Of course, so long as the count is conducted by humans, it undeniably will be possible to allege some degree of inconsistency in the treatment of individual ballots – as is the case whenever the application of any legal standard (*e.g.*, negligence, public forum) is at issue. That will be true in *every* one of the many jurisdictions that provide for manual recounts; it is true whenever States provide for variation in the methods of voting from county to county (*e.g.*, optical scanners as opposed to less reliable punch card ballots), which is now the case in *every* State; and it was true *everywhere* prior to the introduction of mechanical voting machines, when all ballots were counted by hand. Petitioners' theory would mean that all of these practices violate the Fourteenth Amendment. Moreover, if petitioners mean to say that all votes must be tabulated under a fixed and mechanical standard (*e.g.*, the "two-corner chad rule"), their approach would render unconstitutional the laws of States that hinge the meaning

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[16] Petitioners' post-argument submission to the Florida Supreme Court, "Clarification of Argument for Appellees George W. Bush and Dick Cheney" (Exhibit M to Stay Application), was not accepted for filing.

of the ballot on the intent of the voter – and also would mean that the Constitution requires the disenfranchisement of many voters whose intent is clearly discernible. This argument, in our view, is wholly insubstantial. Similar arguments regarding the conduct of elections uniformly have been rejected by the courts.

In any event, if the standard set out by the Florida Court is not applied consistently, applicants will have recourse to the Leon County Circuit Court and, on appeal, to the Florida Supreme Court, either of which will be able to eliminate any inconsistency by determining itself which ballots meet the statutory standard.[17]

1. *The Florida Supreme Court's order to review the ballots from Miami-Dade County is consistent with established state law.*

The Florida Supreme Court's order to "remand this cause for the circuit court to immediately tabulate by hand the approximately 9000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed," Slip op. at 38, was consistent with established state law for handling contest actions. As such, it raises no substantial federal questions.

This holding was a rather straightforward application of the Legislature's injunction, in Section 102.168(3), against the exclusion of "a number of legal votes sufficient to change or place in doubt the outcome of the election," coupled with its command to the judiciary in the contest proceeding to "ensure that any allegation in the complaint is investigated, examined ... to prevent or correct any alleged wrong." Fla. Stat. § 102.168(8). Moreover,

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[17] And, indeed, Florida statutory law provides that opportunity with regard to any ballots that a candidate believes should not have been counted during a manual recount pursuant to Fla. Stat. § 102.166, see App. 36 (complaining about standards used during previous manual recounts). See Fla. Stat. § 102.168(3)(c) (permitting a candidate to contest the inclusion of "illegal votes" in the certified election results).

the Court's decision was premised on the trial court's finding of "less than total accuracy, in regard to punchcard voting devices utilized in Miami-Dade" County, *Gore* v. *Harris*, No. 00-2808 (Fla. 2d Judicial Cir. Dec. 4, 2000), and a holding of a Florida appellate court that the Miami-Dade Canvassing Board's decision to abandon its count was an abdication of its "mandatory obligation" under Florida law. *Miami-Dade County Democratic Party* v. *Miami-Dade County Canvassing Board*, 25 Fla. L. Weekly D2723 (Fla. 3d DCA Nov. 22, 2000). This remedy is well established under Florida law in election contest cases. See *Broward Cty. Canvassing Bd.* v. *Hogan*, 607 So. 2d 508 (4th Dist. App. 1992); *Morse* v. *Dade County Canvassing Bd.*, 456 So. 2d 1314 (3rd Dist. App. 1984); *McQuagge* v. *Conrad*, 65 So. 2d 1851 (Fla. 1953); *State ex rel. Carpenter* v. *Barber*, 198 So. 49 (1940); *State ex rel. Peacock* v. *Latham*, 170 So. 475 (1936); *State ex rel. Titus* v. *Peacock*, 170 So. 309 (1936); *Ex parte Beattie*, 245 So. 591 (1936); *Nuccio* v. *Williams*, 120 So. 310 (1929); *Ex parte Smith*, 118 So. 306 (1928); *Florida* v. *Knott*, 72 So. 651 (1916); *State ex rel. Law* v. *Saxon*, 5 So. 801 (1889).

Fashioning such a remedy in no way violates the U.S. Constitution in general, or its Equal Protection Clause specifically. Targeting the vote count to those ballots that had not registered on machines that were found not be accurate by the trial court was a narrowly tailored remedy authorized under state law, that certainly does not discriminate against any group of voters on its face. Indeed, it is the exclusion of these ballots, not their inclusion, that would raise questions of unequal treatment. The Florida Supreme Court's order does nothing more than place the voters whose votes were not tabulated by the machine on the same footing as those whose votes were so tabulated. In the end, all voters are treated equally: ballots that reflect their intent are counted. It is of no constitutional import whether that intent is captured by a machine tabulation or one performed by election officials.[18]

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[18] There has been some suggestion that further manual counting of ballots may produce a "degradation of the ballots," see *Bush*, *supra*, at 2 (Scalia, J., concurring). Yet this suggestion has scant support in the record, and there is ample evidence to the contrary. See, *e.g.*, Tr. 11-22-00, Morning

2. *The Florida Supreme Court's order of a manual tabulation of ballots that were recorded as "no votes" is consistent with state law.*

The gravamen of petitioners' complaint concerning the manual recount has been its selectivity. Yet, in this case, the Florida Supreme Court ordered not a "selective" recount but a *statewide* recount of undervotes in every Florida county that had not already completed a manual recount. Indeed, the Florida Supreme Court expressly *granted* petitioners the relief they sought with respect to a statewide recount, "agree[ing] with the appellees" that Florida statutes "require a counting of the legal votes contained within the undervotes in *all counties* where the undervote has not been subjected to a manual tabulation." Slip op. at 2 (emphasis added). Petitioners cannot complain of a ruling in their favor.

In any event, the availability of the manual recount as a standard post-election procedure is a long-standing feature of Florida law, and of the law of other States,[19] and has been repeatedly used as part of Florida's system of electoral checks and balances to ensure that all lawfully cast ballots are counted.[20] As

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Session, at 7, 13-14 (Remarks of Supervisor Leahy). More importantly, clearly the question of to what extent recounts of the ballots increase accuracy is a question for the state courts and state election officials under state law, not for this Court to resolve.

[19] At least 21 other states have enacted statutes allowing or even – as in Texas – encouraging the use of manual recounts to back up punch-card tabulation systems. Cal. Elec. Code § 15627; Colo. Rev. Stat. § 1-10.5-102(3); 10 Ill. Comp. Stat. § 5/24A-15.1; Ind. Code § 3-12-3-13; Iowa Code § 50.48(4); Kan. Stat. § 25-3107(b); Md. Code § 12-106; Mass. Gen. Laws ch. 54, § 135B; Minn. R. 8235.1000; Mont. Code § 13-16-414(3); Neb. Rev. Stat. § 32-1119(6); Nev. Rev. Stat. § 293.404(3); N.J. Stat. § 19:53A-14; 25 Pa. Code § 3031.18; S.D. Admin. R. 5:02:09:05(5); Tex. Elec. Code § 212.005(d); Vt. Stat. § 260l; Va. Code § 24.2-802(C); W. Va. Code § 3-4A-28(4); Wis. Stat. § 5.90.

[20] The uncontradicted evidence by both respondents' and petitioners' witnesses at trial was that a manual count of punch card ballots was necessary in close elections. Petitioners' expert witness, John Ahmann, testified that a manual count was advisable "in very close elections" (12/3/00 Tr. 442) and detailed ways in which machine deficiencies could

this Court has previously recognized, manual recount procedures, like those that are included in Florida law, are a completely ordinary mechanism for ensuring the accuracy of vote-counts in close elections. See *Roudebush* v. *Hartke*, 405 U.S. 15, 25 (1972) ("A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, §4."). Where some ballots apparently have not been counted, and there is reason to believe that evidence of a voter's

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result in intended votes not registering in a machine count (*id.* at 425, 430, 440-41, 443-45). Respondents' expert witness also so testified. (12/2/00 Tr. 78-87; see also *id.* at 51-54, 63.) Petitioners' witness, Judge Burton, testified that it was possible to discern the clear intent of the voter in hundreds of ballots the machines did not register as a vote. (12/2/00 Tr. 278; see also *id.* at 260-61, 271.) The trial court expressly found that "voter error and/or less than total accuracy in regard to the punchcard voting devices utilized in Dade and Palm Beach counties." (12/4/00 Tr. 10.)

Many studies support the conclusion of the Florida Legislature, the trial court, and witnesses from all sides that machine counts produce inaccuracies. See, *e.g.*, Roy G. Saltman, *Accuracy, Integrity, and Security in Computerized Vote-Tallying*, U.S. Dep't of Commerce, National Bureau of Standards (1988); National Bureau of Standards Report, *Effective Use of Computing Technology in Vote-Tallying* (1978); Ford Fessenden, *Counting the Vote*, N.Y. TIMES, Nov. 17, 2000, at A1 (citing many voting machine manufacturers who say that machine inaccuracy ranged wildly in Florida on November 7, and quoting industry officials who state "the most precise way to count ballots is by hand"); David Beiler, *A Short in the Electronic Ballot Box*, Campaigns & Elections, July/Aug. 1989, at 39; Tony Winton, *Experts: Machine Counts Inaccurate*, AP ONLINE, Nov. 11, 2000 (noting that "officials in England and Germany consider manual counts to be more accurate than automated ones" and quoting computer scientists for the proposition that "problems with automated vote-counting equipment, especially the computer card punch type used in south Florida, have been well documented" and that error rates of two percent to five percent are routine); Marlon Manuel, *Recounts: Democratic Official Defends Method That Bush Opposes*, ATLANTA J. & CONST., Nov. 17, 2000, at A11 (quoting president of company that "sells ballot software to 12 Florida counties, including . . . Palm Beach, Miami-Dade and Broward" for the proposition that "[i]f they're trying to determine a voter's intent, they're not going to get it off our machine or any machine").

intent may exist on the face of those ballots, it is an entirely reasonable remedy to direct a manual examination of those ballots to determine whether voter intent can be clearly ascertained. In that regard, the remedy of the Florida Supreme Court was to adhere strictly to the directive of the Florida Legislature that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." Fla. Stat. § 101.5614(5).

It is important to note that petitioners do not claim that the Florida Supreme Court's order is discriminatory in any invidious manner; they do not claim that any citizens of Florida were improperly denied their right to vote; and there is no claim of any fraudulent interference with the right of anyone to vote. Petitioners make none of these claims, which in certain circumstances have provided the basis for federal intervention in state election procedures and/or findings of invalidity of such procedures. Instead, petitioners' contention here seems to be that there is some constitutional defect in a state procedure that permits manual recounts to occur for some votes which may have been missed (undervotes), but not all votes (*i.e.*, votes that were effectively counted by automated processes). The Florida process, however, provides citizens of each county, and candidates for office within each county, with equal rights: No votes can be "diluted" in the constitutional sense by a process that seeks simply to count the legally cast votes of citizens participating in an election whose votes may not have been recognized by an initial machine count.[21] All undervotes are treated the same way under

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[21] The "dilution" cases petitioners cite, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964), and *Roman* v. *Sincock*, 377 U.S. 695 (1964), involve the one-person, one-vote principle under which voters from different districts cannot be given votes of unequal weight. That issue is not even presented where, although the election is conducted by individual counties, the winner is determined based on his statewide popular vote. Petitioners' heavy reliance on *O'Brien* v. *Skinner*, 414 U.S. 524 (1974), is equally misplaced. *O'Brien* stands only for the unremarkable proposition that voters cannot be denied the right to vote solely because of their county of residence. The Florida Supreme Court's order does not work any such irrational discrimination.

the Florida Supreme Court's order. The Equal Protection Clause does not require that the Florida Supreme Court ignore the most accurately counted vote totals while seeking to ensure that all votes are counted.[22]

The use of different vote tabulating systems undoubtedly will generate tabulation differences from county to county.[23] But this will be true "[u]nless and until each electoral county in the United States uses the exact same automatic tabulation (and even then

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Rather, the remedy fashioned is applied generally and equally to all undervotes in the state.

[22] Many states expressly allow for county-by-county or precinct-by-precinct recounts. See, *e.g.*, Cal. Elec. Code § 15621 (voter may request recount and specify counties in which recount is sought and order of precincts to be counted; voter must fund recount); Ind. Code § 13-12-11-1 (candidate entitled to recount, which may be conducted in one or more precincts); Iowa Code § 50.48(4) (any statewide candidate, upon posting bond, is entitled to a recount in "one or more specified election precincts" within counties); Kan. Stat. § 25-3107(b) (candidate (or voter) may request a recount of "the ballots cast in all or in only specified voting areas for the office for which such person is a candidate," with the recount method being at the discretion of requesting party; bond must be posted); Mont. Code §§ 13-16-211, 13-16-305 (any unsuccessful candidate can petition for a recount in specified counties upon posting bond; candidates can also petition a state court for a recount in one or more counties and in one or more precincts within each county, and court "shall order a recount in only the counties or precincts for which sufficient grounds are stated and shown"); N.J. Stat. § 19:28-1 (any candidate (or group of 10 voters) who believes that an error may have occurred can apply to state court for a recount of votes cast in any district or districts); Tex. Elec. Code § 212.001(5) (campaigns or voters may request a recount, specifying the election precincts, grouped by county or otherwise, for which the recount is desired); Wis. Stat. § 9.01 (any candidate or voter may request a recount on ground of mistake or fraud; requesting party must post bond and identify specific locations where recounts are desired).

[23] Florida's 67 counties use four different voting systems: one county counts all votes by hand; one uses mechanical lever voting machines (votes recorded on counter wheel when voters pull lever); 24 use punch card voting systems; and 41 use marksense voting systems (optical scanners detect marks made on ballot). See Pet. App., Exh. A, submitted with petition in *Touchston* v. *McDermott* (Dec. 8, 2000); *Touchston* v. *McDermott*, No. 00-15985, 2000 WL 1781942, at n.16 (CA11 Dec. 6, 2000).

there may be system malfunctions * * * .)." *Siegel* v. *LePore*, 2000 WL 1687185, at *7 (S.D. Fla. Nov. 13, 2000). As Chief Judge Anderson noted in the *Siegel* appeal: "No court has held that the mere use of different methods of counting ballots constitutes an equal protection violation." *Siegel* v. *LePore*, 2000 WL 1781946, at *14 (CA11 Dec. 6, 2000) (concurring opinion). Indeed, the fact that counties have different ballot marking and counting systems demonstrates the value in having statutory checks and balances such as a manual recount process.[24] County-to-county variations of this nature do not violate the constitution. See, *e.g.*, *Wyche* v. *Madison Parish Police Jury*, 635 F.2d 1151, 1158 (CA5 1981) (legislative deviation from equality is permissible for purposes of administrative convenience, adherence to historical or geographic boundaries and recognition of separate political units).[25]

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[24] For example, most counties in Florida utilize an optical scanning vote count system. That system performed with great accuracy during the presidential race, resulting in only a 0.3% undervote rate (4 in 1000 ballots). In contrast, punch card systems such as those used in Palm Beach, Broward and Miami-Dade Counties experienced a 1.5% undervote rate (15 in 1000 ballots) in the presidential race. The manual recount process can ameliorate some of the disparity created by the use of different marking and counting equipment. Such a system not only does not violate the Equal Protection Clause; it also enhances the equality of the voting process.

[25] Many legal standards require a finder of fact to examine evidence and make a judgment regarding intent. *Morissette* v. *United States*, 342 U.S. 246, 274 (1952) (intent is a question of fact for a jury). Will contests seek the intent of the decedent. Reliance on finders of fact to apply broad standards is ubiquitous. *Russell* v. *Gill*, 715 So. 2d 1114 (Fla. Dist. Ct. App. 1998) (where the terms of a contract are ambiguous, intention of the parties may be ascertained from all of the pertinent facts and circumstances); *Holland* v. *United States*, 348 U.S. 121 (1954) (evidence must be sufficient to convince criminal jury of the guilt of the accused beyond a reasonable doubt). Indeed, the law is full of standards that require judgment to ascertain intent. Federal juries in criminal fraud cases are instructed to consider the facts in evidence and that "[t]o act with intent to defraud means to act knowingly and with the intention or the purpose to deceive or cheat." O'Mally et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 16.07 (5th ed.).

3. *The "voter intent" standard set by Florida law does not violate the Equal Protection Clause.*

The Florida statutory standard used in conducting manual recounts – ascertainment of the voter's intent, see Fla. Stat. § 102.166(7) – does not violate equal protection requirements. It is incorrect to assert, as petitioners do, that the standard for determining whether a ballot should be counted varies from county to county. The "voter intent" standard is the same throughout Florida, and the circuit court issued detailed guidelines to ensure that the manual counts proceeded in a uniform fashion. Each ballot must be reviewed ballot-by-ballot to determine the voter's intent in the context of the entire ballot. Arbitrary exclusions would violate the Florida statutory scheme. The Florida Supreme Court's instructions in *Harris* were given to prevent this result.

In its decision, the Florida Supreme Court reaffirmed the governing standard by which the recounts were to proceed – one that has been in place in Florida and countless other states for years: "the standard to be employed is that established by the Legislature in our Election Code which is that the vote shall be counted as a 'legal' vote if there is 'clear indication of the intent of the voter.'" Slip op. at 40 (citing Fla. Stat. § 101.5614(5)). The state circuit court issued detailed guidance based on this standard immediately after the Florida Supreme Court's decision. The Florida canvassing boards and courts have long implemented that standard, and vote totals certified in this and many previous elections reflect countless ballots manually recounted under this same standard. See, *e.g.*, *Darby* v. *State*, 75 So. 411, 413 (Fla. 1917). Indeed, the Secretary of State's November 14 certification included numerous manually counted votes for petitioners, including vote totals from heavily Republican counties.

Hence, the contention that the "intent of the voter" standard violates equal protection (or due process) is nothing more than an argument that the contest and recount procedures of Florida's election code, which mirror those that have long existed in one form or another in numerous States, are on their face

unconstitutional. Manual counting and recounting of ballots under the intent of the voter standard has been the *rule*, not the exception, in this country for generations – indeed, for most of the period since its founding. See *Bush* v. *Gore*, No. 00-949 (00A504) (U.S. Dec. 9, 2000) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting) ("intent of the voter" standard followed by Florida Supreme Court is "consistent with the prevailing view in other States"); see also *Delahunt* v. *Johnston*, 671 N.E.2d 1241 (Mass. 1996); *Pullen* v. *Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990); *Stapleton* v. *Board of Elections*, 821 F.2d 191 (CA3 1987); *Hickel* v. *Thomas*, 588 P.2d 273, 274 (Alaska 1978); *Wright* v. *Gettinger*, 428 N.E.2d 1212, 1225 (Ind. 1981); *Democratic Party of the Virgin Islands* v. *Board of Elections*, 649 F. Supp. 1549, 1552 (D.V.I. 1986) ("There can be no question then, that the intention of the elector must be paramount. Neither a regulation of the Board of Elections, nor a decision of the supervisor of elections, can supercede the requirement that where the elector's intent can be divined, it should be given effect.") (citation omitted)); cf. *NLRB* v. *Americold Logistics, Inc.*, 214 F.3d 935, 939 (CA7 2000) ("The Board's policy – and the rule in this circuit – is to count ballots when the voters' intent is clear, despite irregularities in the manner in which the ballots have been marked") (citations omitted); *TCI West, Inc.* v. *NLRB*, 145 F.3d 1113, 1115 (CA9 1998) ("The general rule in this Circuit and most other circuits, as well as the policy admitted by the Board is that a ballot should be counted where a voter's intent is clear, despite irregularities in the voter's mark.") (citations omitted)); *NLRB* v. *Duriron Co.*, 978 F.2d 254, 257 (CA6 1992) ("A ballot should normally be counted if there is a clear expression of preference regardless of an irregularity in the voter's mark."); *Stapleton* v. *Board of Elections*, 821 F.2d 191 (CA3 1987); *NLRB* v. *Connecticut Foundry Co.*, 688 F.2d 871, 875 (CA2 1982) ("The general rule is that a ballot should be counted if there is a clear expression of preference, regardless of the irregularity of the mark on the ballot.") (internal quotations omitted); *Wackenhut Corp.* v. *NLRB*, 666 F.2d 464, 467 (CA11 1982) ("We seek to determine whether the Board's

action here is consistent with the admitted Board policy of attempting to give effect to the voters' intent whenever possible") (internal quotations omitted) (citing *NLRB* v. *Manhattan Corp.*, 620 F.2d 53 (CA5 1980); *NLRB* v. *Titche-Goettinger Co.*, 433 F.2d 1045 (CA5 1970)).

Moreover, with respect to the counting of punch card ballots, most States do not attempt specifically to define what particular appearance of the ballot is required before a vote is to be counted. Even those States that do have such standards usually have a "catch-all" provision permitting the counting of any ballot that "otherwise reflects the intent of the voter." *E.g.*, Tex. Elec. Code § 127.130(d)(4), (e) (vote to be counted if "indentation" on chad or other mark indicates clearly ascertainable intent of voter); Ind. Code Ann. § 3-12-1-1. At least 22 states have enacted statutes allowing – or even as in Texas encouraging – the use of manual recounts to back up punch-card tabulation systems. See *supra*.

Even in states that have adopted statutory guidelines to assist in ascertaining voter intent, the ultimate goal is to determine how a voter intended to vote. For example, the election code of Texas provides as follows:

> (d) Subject to Subsection (e), in any manual count conducted under this code, a vote on a ballot on which a voter indicates a vote by punching a hole in the ballot may not be counted unless:
>
> (1) at least two corners of the chad are detached:
>
> (2) light is visible through the hole;
>
> (3) an indentation on the chad from the stylus or other object is present and indicates a clearly *ascertainable intent of the voter* to vote; or
>
> (4) the chad reflects by other means a clearly *ascertainable intent of the voter* to vote.
>
> (e) Subsection (d) does not supersede any clearly *ascertainable intent of the voter*.

Tex. Elec. Code § 127.130 (emphasis added). The Texas statute, while providing guidelines for manually counting punch card ballots, thus establishes the intent of the voter as the paramount and overriding standard. Indeed, the guidelines set forth in subsection (d) are made expressly subject to this overarching standard. If the Florida standard is struck as unconstitutional, it is difficult to see how statutes such as the Texas election code could survive.

If petitioners have complaints about the treatment of particular ballots, or the treatment of ballots in particular locations, the Florida procedure now in place provides a perfectly suitable mechanism for addressing them: such complaints may be presented to the circuit court and tested on appeal. But rather than invoke that traditional remedy, petitioners would have the Court abruptly end the counting altogether and *toss out lawfully cast ballots that have been, and are now being, counted.* That is an absurd and unprecedented response to an asserted flaw in the process for tabulating votes, and one that surely is not required by the U.S. Constitution. In fact, if there is anything to petitioners' equal protection claim, the remedy is not to end the counting of votes; it is, instead, to articulate the proper standard and – as required by state law – to have the counting go forward under that standard.

B. There Is No Violation of the Due Process Clause.

Petitioners' claim under the Due Process Clause has no merit. First, any suggestion that the application of different counting standards by different counties raise due process concerns here is fatally flawed because petitioners have utterly failed to develop any record evidence to support their accusations in this regard and can offer only unconfirmed rumors and untested accusations. As described *supra*, recounts have in fact proceeded in an orderly and uniform fashion. Florida's manual recount system acts as an important check on the ballot counting process that promotes, not erodes, public trust in the electoral system. The manual recounts here, for example, were conducted in full public view by counting teams made up of representatives from different political parties,

with the supervision of a three-member canvassing board that includes a sitting county judge and review by the Florida judiciary. And the circuit court developed lengthy and detailed guidelines to ensure uniformity and accuracy.

Petitioners' allegations about the recount process are thus without any factual basis. Moreover, they are not even legally cognizable. Petitioners have failed to adduce proper evidence to support their claim. In any event, if there are isolated mistakes or inaccuracies during recounts, petitioners have ample remedies available to them under Florida law and Florida procedure to secure full redress. There is no warrant for holding the entire recount procedure unconstitutional on its face.

Petitioners' argument would have the unthinkable consequences of (i) overturning the settled "intent of the voter" standard; (ii) invalidating the entire election in Florida, in which many ballots already have been included in the certified totals as a result of manual counting, and (iii) calling into question numerous other results nationwide in a host of local, state, and national elections. Not surprisingly, petitioners' argument also flatly contradicts their representation of counsel before the Florida courts in the *Bush* v. *Palm Beach County Canvassing Board* litigation (quoted above), in which they urged that manual recounts should be conducted pursuant to a *contest* in order to minimize concerns regarding the standards for counting.

To the extent that petitioners' due process argument rests on the claim that the Florida Supreme Court imposed standards for counting the votes that were not in place when the votes were cast, that argument must fail for reasons already discussed above: the law enunciated in the Florida Supreme Court's opinion is the law as it existed on election day and long before it. In fact, this argument is particularly flawed in the due process context. To establish the charge of a constitutionally impermissible retroactive change in the law, petitioners would have to demonstrate not simply that the Florida Supreme Court's decision constituted a retrospective change and that the change deprived them of a cognizable liberty or property interest, but also that the change

was "arbitrary and irrational." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); see also *id.* at 537 (plurality opinion of O'Connor, J.) (same); *id.* at 556 (Breyer, J., dissenting) (same). Petitioners cannot possibly meet this standard,[26] and the authorities on which they rely are wholly inapposite.[27]

The only due process right even arguably implicated by this case is the right of voters to have their ballots counted, a consideration that strongly supports the state supreme court's decision. It is worth noting in this respect that petitioners

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[26] This Court's decisions reflect the strong presumption, consistent with this Court's understanding of the nature of the judicial act, that judicial rulings must be retrospectively applied to the parties themselves. See, *e.g.*, *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993); see *id.* at 107-08 (Scalia, J., concurring).

[27] *Roe* v. *Alabama*, 43 F.3d 574 (per curiam), and 68 F.3d 404 (CA11 1995) (per curiam), involved the claim of Alabama *voters* that the effectiveness of their votes would be diluted by the retroactive abrogation of a uniform, long-standing prohibition on accepting certain write-in ballots. Not only do petitioners lack standing to raise such a claim, but the Eleventh Circuit's holding rested on the fact that the change in Alabama law resulted in the counting of selected ballots that previously had been regarded as *illegal* in circumstances where voters who were *not* given the benefit of the new rule of eligibility could plausibly allege that they would have decided to vote had the onerous requirements lifted for others been lifted for them as well. Petitioners assert here the very different interest in precluding the counting of entirely *lawful* ballots, an interest that cannot possibly have constitutional footing.

Any reliance on *United States* v. *Mosley*, 238 U.S. 383 (1915), *United States* v. *Classic*, 313 U.S. 299 (1941), and *Lane* v. *Wilson*, 307 U.S. 268 (1939), would also be misplaced. All three decisions involve cases in which voters were deliberately and insidiously disenfranchised. *Mosley* and *Classic* were criminal cases that involved conspiracies to preclude votes in certain precincts from being counted and to count votes for a candidate as votes for his opponent. *Lane* was a challenge to a state statutory scheme that permanently disenfranchised a class of voters who failed to register to vote during a certain ten-day period. Unlike the cases cited by petitioners, the Florida statutory process seeks to enfranchise voters where machine marking and recording equipment may have worked a disenfranchisement of voters who cast legal ballots.

themselves have taken the view that military absentee votes should be counted even if the ballots in question did not comply with various clear requirements of Florida statutory law. We agree that voters have important rights to have their ballots counted, and the magnitude of those rights dwarfs any due process claim petitioners assert here.[28]

At bottom, all petitioners can really claim is that, in their view, the Florida Supreme Court got Florida law wrong. But a "'mere error of state law' is not a denial of due process." *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982); *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948) ("otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question"); *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 680 (1930) (Brandeis, J.) ("[T]he mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court"). To hold that the decision below violates due process would do violence both to principles of federalism and to the independence of the judiciary throughout the United States. It would invite an onslaught of such claims by the losing parties in state courts alleging that the decisions in their cases constituted an unconstitutional departure from "preexisting law." And it would undermine the authority of the judiciary to decide the meaning of law, by holding that apparently routine judicial acts of statutory construction long thought to involve only questions of state law in fact amount to illegitimate and unconstitutional usurpations of the legislative role.

CONCLUSION

The stay granted by this Court should be immediately

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[28] Even if this Court disagreed, the appropriate remedy for either an Equal Protection Clause or Due Process Clause violation would not be to cancel all recounts, but rather to order that the recounts be undertaken under a uniform standard. Counting *none* of the votes would be vote dilution with a vengeance.

dissolved, and the judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted.

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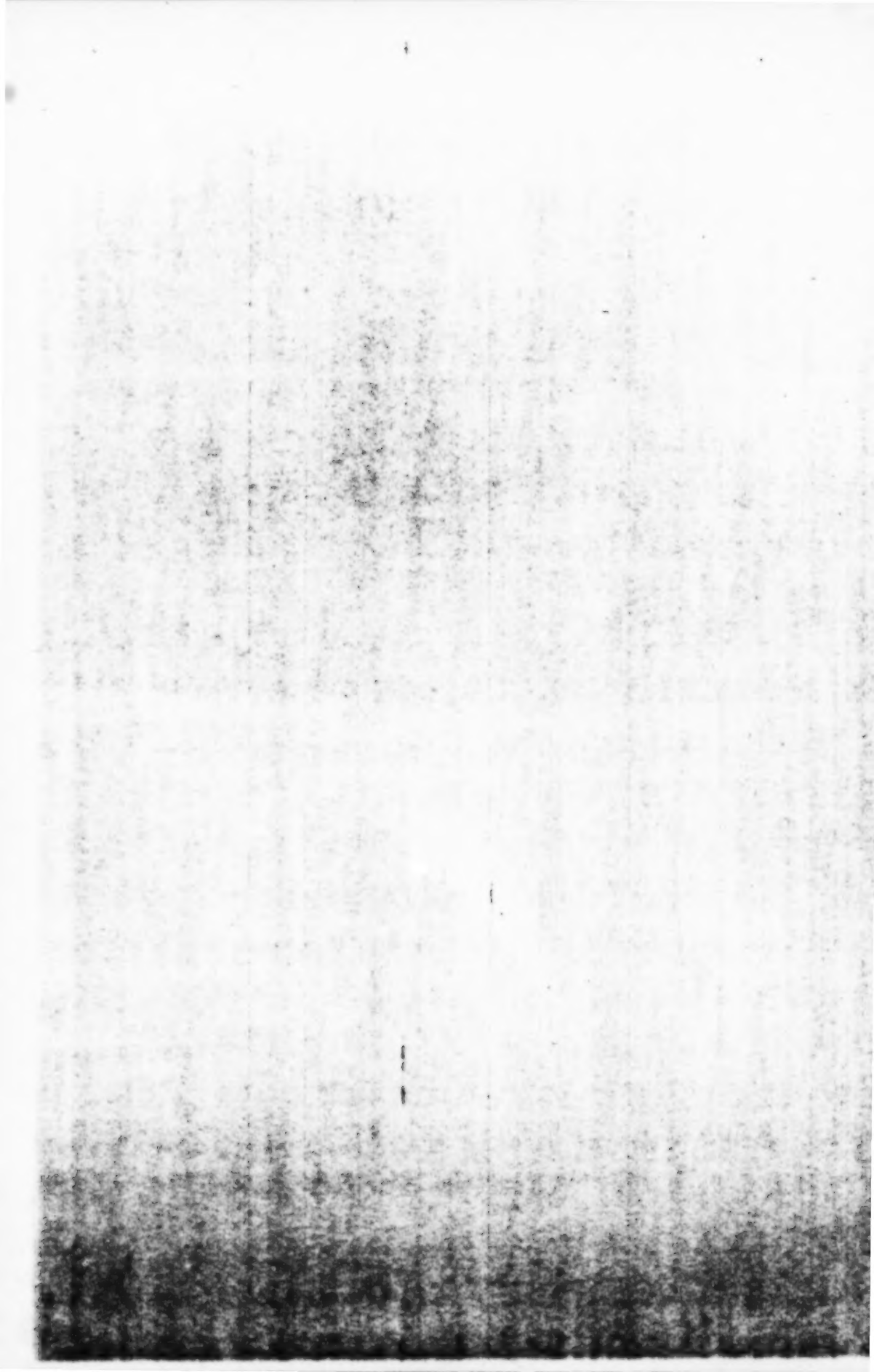

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IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE W. BUSH AND RICHARD CHENEY,
Petitioners

vs.

ALBERT GORE, JR. ET AL., Respondents

BRIEF FOR RESPONDENT/INTERVENORS STEPHEN CRUCE, TERESA CRUCE, TERRY KELLY, AND JEANETTE K. SEYMOUR, IN SUPPORT OF PETITIONERS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

Bound up in the questions included in the grant of certiorari is this essential issue:

I. Whether letting an arbitrary standard for determination of voters' intent vary from county to county in Florida violates an individual voter's constitutional right to due process and equal protection under the law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

LIST OF PARTIES

The Respondent/Intervenors agree with the Petitioner's list of "Parties to the Proceeding" as presented in Petitioner's Emergency Application for Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of Florida.

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OPINIONS BELOW

The Respondent/Intervenors agree that the Petitioner has correctly stated the official and unofficial reports of the opinions and orders entered in the case by the courts below, as stated in Petitioner's Emergency Application for

Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of Florida.

STATEMENT OF JURISDICTION

The Respondent/Intervenors agree with the Petitioner's statement of jurisdiction as presented in Petitioner's Emergency Application for Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of Florida.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Respondent/Intervenors agree with the Petitioner's statement of the constitutional provisions and statutes involved in this matter, as presented in Petitioner's Emergency Application for Stay of Enforcement of the

Judgment Below Pending the Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of Florida.

STATEMENT OF THE CASE

The Respondent/Intervenors agree with the Petitioner's statement of the case, as presented in Petitioner's Emergency Application for Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of Florida. In addition, they simply add that these Intervenors are registered and qualified voters and Florida taxpayers from counties located in West Florida. Two of them cast their votes for a president, and two of them did not cast a vote in the 2000 presidential election.

SUMMARY OF THE ARGUMENT

Conducting statewide manual recounts without objective standards to implement violates these Intervenors' equal protection rights, as protected by the Fourteenth Amendment to the United States Constitution. Simply put, if a manual review of ballots is done so that only a portion of the State's ballots is reviewed, then every vote will not be counted on an equal basis, and each voter's fundamental right to vote will be diluted or debased as a result. Thus, the Supreme Court of Florida erred when it ordered a partial, manual recount of ballots throughout the State.

ARGUMENT

I. APPLYING AN AMBIGUOUS STANDARD TO THE MANUAL COUNTING OF BALLOTS ON A STATEWIDE BASIS VIOLATES AN INDIVIDUAL

FLORIDA VOTER'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION UNDER THE LAW, IN DEROGATION OF THAT VOTER'S RIGHTS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Being taxpayers and voters from Florida, these Intervenors stand in a position quite different from those of the candidates. Thus, their view of the 2000 presidential election in Florida comes from a statewide perspective, and their concerns lean toward the legitimacy and constitutionality of the election process, more than to their own preference of who ought to win.

In its December 8, 2000, Per Curiam Order, the Supreme Court of Florida overturned the Final Judgment rendered by the Circuit Court, in and for Leon County,

Florida. Gore et al. v. Harris, et al., Case No. SC00-2431, December 8, 2000, slip op. at 2 [hereinafter referred to as the "Gore Decision"].[1] As part of its order on remand, the Florida Supreme Court directed the circuit court:

> **to enter such orders as are necessary to add any legal votes to the total statewide certifications and to enter any orders necessary to ensure the inclusion of the additional legal votes for Gore in Palm**

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[1] Intervenors agree to the presentation of exhibits presented with Petitioner's December 8, 2000, Emergency Application for a Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of Florida. **Exhibit A** was the Florida Supreme Court's December 8, 2000, per curiam order. **Exhibit B** was the Final Judgment of the Circuit Court, in and for Leon County, Florida (Judge Sauls). **Exhibit C** was the transcript of Judge Saul's December 4, 2000, ruling in open court. **Exhibit D** is this Court's December 4, 2000, per curiam decision in Bush v. Palm Beach County Canvassing Bd., 531 U.S. ___ (2000) (Case No. 00-836).

Beach County and the 168 additional legal votes from Miami-Dade County.

Id. at 39. However, the court gave no directions to the Circuit Court as to how it should implement objective standards in such a statewide manual recount and, even though it agreed with the Intervenors that a statewide remedy was necessary, id. at 38, it nevertheless failed to order a statewide recount of all ballots, id. at 39. For example, those ballots that had already been manually checked under varying standards before trial were exempt from the court's mandate.

The Supreme Court of Florida ordered a manual recount of all "undervotes"[2] in those counties where a

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[2] It is not clear whether the Florida Supreme Court defined "undervotes" as those ballots showing no vote for a presidential candidate or as those ballots rejected by a machine as casting more than one vote for a presidential candidate, i.e., an "overvote." As we use it in this brief, a

manual recount had not yet been completed. As quoted above, it also delegated to the Circuit Court broad, and undefined, powers to enter such necessary orders so as to implement its order. The Supreme Court of Florida erred because to order a manual recount, under the circumstances of this case, resulted in an infringement upon the equal protection rights of all Florida voters, in general, and of the Intervenors, in particular.

On remand, the Circuit Court directed the Supervisors of Election and Canvassing Boards in other Florida counties that "have not conducted a manual recount or tabulations of the non-votes or undervotes to do

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"no vote" or "non-vote" refers to ballots that are rejected by a machine for one reason or another. An "undervote" is a ballot rejected by a machine because the machine did not detect a vote for a presidential candidate, and an "overvote" is a ballot rejected because the machine detected more than one vote for president.

so forthwith." This apparently was intended to include all undervotes and overvotes, but does not specifically direct Supervisors of Elections to recount any absentee ballots that had not already been counted. In any regard, all ballots should have been looked at on an equal basis.

As fully stated in Governor Bush's Motion for Stay[3] [hereinafter referred to as Bush's December 8 Petition], the Fourteenth Amendment to the United States Constitution provides, in relevant part, that:

> All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.**

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[3] Pursuant to this Court's December 9, 2000, Order on Application for Stay, Governor Bush's Motion shall be treated as a Petition for Writ of Certiorari. We will hereinafter refer to it as his December 8 Petition.

Bush's December 8 Petition at 4. And, according to this Court in Gray v. Sanders, 372 U.S. 368, 379-80, 83 S. Ct. 801, 808-09, 9 L. Ed. 2d 821 (1963),

> Once the geographical unit for which a representative is to be chosen is designated, **all who participate in the election are to have an equal vote** – whatever their race, whatever their sex, whatever their occupation, whatever their income, and whatever their home may be in that geographical unit. **This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in the State, when he casts his ballot in favor of one of the several competing candidates, underlies many [United States Supreme Court] decisions.**

Even though Gray v. Sanders is an apportionment case, the concepts apply equally to the extraordinary set of

circumstances in which the Intervenors now find themselves. Our research has not revealed any controlling case law applying the Fourteenth Amendment to the precise set of facts found here.

Under the circumstances of this case, the ballots cast by Florida voters will be treated in a disparate manner if any manual recounts are done. Even if a statewide manual recount were to be done, those who followed the rules and properly cast their ballots so that a machine could count their votes would have the value of their properly-cast ballot diluted. On the other hand, those who may have failed to follow the directions by first marking one choice for president and then by marking, perhaps by accident, another choice for president would be given special consideration. In other words, Florida's elections laws would be applied in an unequal manner to each individual

voter, depending on how he or she filled in his or her ballot.

To allow a presidential election candidate to "cherry-pick" the counties from which he or she wishes to harvest more votes would be to allow that contestant to identify those ballots that, legally, have not qualified as a "legally cast vote," but that nevertheless can be resurrected as a valid vote by individuals who must read the mind of the voter and decipher the true intent of that voter.

Where is the bright line over which this process of resurrecting votes cannot cross? Contestants obviously cannot bring in additional voters who failed to cast a vote on election day. Likewise, contestants may not resurrect ballots where the voter, out of indecision, failed to mark one of the presidential ballots so that the contestant can add that vote to his or her tally. It is similarly unwise to allow contestants -- who are motivated to find every available

vote – to allow them to bring ambiguously marked ballots to election officials (who may or may not be of a similar party affiliation) and ask those officials to review the ballots for legally permissible votes. Such a system rests on an undesirable potential for abuse, and such a system is contrary to the principle that "all votes are equal." Additionally, in a *post election setting*, allowing ballots to be reviewed on a basis different than that imposed on Election Day effectively changes the "rules of the game" after the contest.

As was recently stated by Judge Tjoflat, by "changing the 'rules of the game' after it was played, the supreme court [of Florida] debased the votes of thousands of Florida voters and denied them the equal protection of the laws guaranteed by the Fourteenth Amendment." Touchston v. McDermott, 11th Cir., Case no. 00-15985,

December 6, 2000, slip op. at 3 (Tjoflat, J., dissenting). These Intervenors agree with Judge Tjoflat's arguments and acknowledge that those arguments are much more eloquent and compelling than those arguments found herein. Therefore, to the extent Judge Tjoflat's arguments apply to these circumstances, we incorporate them by reference and encourage the Court to read his opinion in its entirety.

This Court has held that "the right to suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, 377 U.S. 533, 555, 84 S. Ct. 1362, 1378, 12 L. Ed. 2d 506 (1964). Thus, in the instant case, the Intervenors' fundamental right to vote has been effectively denied by the debasement and dilution of their vote. Specifically,

their individual votes were counted, or perhaps not[4] but, because they do not live in counties were the Respondent, Albert Gore, Jr., sought more votes, their ballots were not initially reviewed. After the Supreme Court's Gore decision, their votes may be considered, but the standard to be applied will be different than those applied throughout the rest of the state.

As Judge Tjoflat stated in his opinion, Florida's vote tabulation machines are not merely "screening" the ballots; otherwise, the county canvassing boards would

---

[4] Intervenor Teresa Cruce testified she cast her ballot for a presidential candidate before November 7, via absentee ballot, and does not know whether it was ever counted as a vote. Concepts of fairness require that her vote be treated the same as others.

not have been lawfully authorized to certify the results of the machine count--not once, but twice, following the machine count and the mandatory machine recount. Presumably, the Florida Legislature mandated an automatic machine recount following the election, simply because the difference between the two candidates was less than of 1% of the total votes (per Section 102.141(4), Florida Statutes). To require a manual recount now, as if machine recounts have always been inaccurate and untrustworthy, means either the Supreme Court changed the rules after the election or the canvassing boards in all 67 counties shirked their duties on November 7 and November 8 by not immediately conducting a manual recount so as to "validate" the result. Given Florida's election scheme, this seems illogical.

II. The Decision Below Also Violates Basic First Amendment Rights by Singling Out for Heightened Scrutiny the Votes of Citizens Who Chose Not to Vote for Any Candidate for President.

The Florida Supreme Court s critical holding orders election officials in all counties that have not conducted a *manual recount* or tabulation of the undervotes in this election to do so forthwith. Slip Op. at 38-39. But the term manual recount as used in the opinion is a misnomer. What the court had in mind was not a *recounting* of all of the votes as actually cast by voters (and twice tabulated by machine processes that have not been impugned by allegations of error). It envisioned, rather, a selective process in which a number of legal votes would be *recovered* from the entire pool of the subject ballots. Slip Op. at 23. This so called recovery of selected votes

(as opposed to a recounting of all of them) is exemplified by the court s holding that, as a matter of law, the circuit court erred by not adding to the official vote totals 176 to 215 votes for Vice President Gore recovered after the election by the Palm Beach canvassing board. Slip op. at 34-35. At best, Palm Beach precariously assigned these votes to the Vice President (recovered them) through *post* hoc gestalt analysis of voters intentions. See Florida Democratic Party v. Palm Beach County Canvassing Board, No. CL00-11078AB slip. Op. (Fla. 15th Jud. Cir Nov. 15, 2000). At worst, votes were appropriated (recovered) through exercise of the raw political power. In either case, what occurred in Palm Beach County had little to do with recounting.

But even the Palm Beach operation, while not a recount in substance, conformed to the appearances of a

recount: It involved all of the votes cast in that county. The recovery effort ordered below, by contrast, fails even to keep up appearances. Instead of involving *all* votes, as would a true *re*counting, the court-ordered effort focuses only on a highly selective subset of votes --- votes by voters whose chose not to disclose their preferred candidate for President.

This tightly focused recovery process violates Florida voters First Amendment right *not* to speak; specifically, their right not to speak to the issue of who they would prefer to be President. See, e.g., Anderson v. Celebrezze, 460 U.S. 780 (1983) (holding that the First Amendment places limits on state law governing presidential elections). Floridians, like all Americans, enjoy the constitutional right *not* to express a preference for any of the presidential candidates listed on a ballot. A

law expressly penalizing those who choose not disclose a preference for any ballot-listed or write-in presidential candidate would therefore run afoul of the established rule that the rights protected by the First Amendment include both the right to speak freely and the right to refrain from speaking at all. Wooley v. Maynard, 430 U.S. 705, 714 (1977). For example, laws declaring that voters *must* vote for President in order to see their votes counted for the other contests appearing on the same ballot would violate the First Amendment; the free exercise of the franchise cannot be burdened, however trivially, by laws that fail to further legitimate, election-related objectives. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966) (exercise of the franchise may not be burdened by *de mimimis* fee).

So here, Florida may not condition the right to vote

for some offices on the sacrifice of the First Amendment right *not* to disclose the voter s preferred presidential candidate. But in contravention of this principle, the decision below singles out for unfavorable treatment the votes of voters who chose *not* to express a preference for any candidate for President (or, interpreted differently, voters who affirmatively expressed their preference for no candidate). Most voters in the Florida counties using punchcard ballots are to have their votes registered as rendered without additional scrutiny. The punchcard ballots of Bush and Gore voters, for example, will not be subjected to *post hoc* gestalt analysis designed to recover them as votes for other candidates or for no candidate. But in sharp contrast, voters who chose to express no preference (or who affirmatively expressed their preference for none of the listed presidential

candidates) will, under the Florida Supreme Court s decision, have their votes singled out, presumptively deemed lost and in need of recovery. This is an unconstitutional, content-based penalty on these voters First Amendment rights."

The case would obviously be different if the Florida Supreme Court s decision rested on factual findings instead of content-based discrimination. Credible evidence of fraud or human or machine error would plainly justify additional scrutiny of a subset of ballots. But the Florida trial court found no evidence of any such failure, nor did the Florida Supreme Court reverse on these grounds. That is unsurprising, for the Florida vote for none of the above appears well within an expected range. Nevada, for instance, was a highly competitive state in this election, with Governor Bush defeating Vice

President Gore by approximately 22,000 votes. Nonetheless, the none of these option on the Nevada ballot polled more than one percent of the vote and out-polled three ballot-listed candidates. *Cf.* Nev. R. Stat. 293B.075 (A mechanical voting system must permit the voter to . . . . indicate a vote against all candidates.). That Nevada percentage for none of the above is slightly more that the percentage of the Florida vote (approximately 43,000 of 6 million votes, or three-fourths of one percent) that was inexplicably targeted for unnecessary and unconstitutional recovery by the court below.

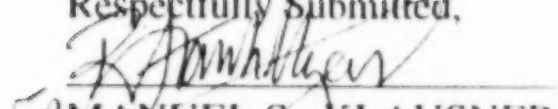
It is not surprising that the mind of the politically obsessed can find it improbable that voters should speak through registering a preference for none of the available candidates or for third-party candidates with scant prospects for victory. But the fact remains that voters, in

Nevada, Florida and elsewhere, *do* express preferences both for third-party candidates and for no candidate at all, even in close elections. These voters enjoy a constitutional right to be taken at their word.

CONCLUSION

The Supreme Court of Florida erred when it ordered a partial manual recount because to do so will adversely affect the Intervenors' right to vote and will fail to recognize the need to treat their vote on an equal basis with votes cast by others. Thus, the Supreme Court of Florida's December 8, 2000, decision should be reversed.

Respectfully Submitted,



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No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH and RICHARD CHENEY,
Petitioners,

v.

ALBERT GORE, Jr., *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF A MEMBER OF THE BAR OF THIS COURT IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amicus anticipates that the parties will file letters granting general consent to briefs *amicus curiae* in this case. In the event such letters are not forthcoming, *amicus* moves for leave on the following grounds:

The brief proposed to be filed is limited to two matters not raised by the parties: (1) the availability of an action in the nature of *quo warranto* as a proper means to resolve this controversy and (2) the definition of "legal vote" implicitly proposed by Petitioners. These points are made concisely in the space of two pages. It is hoped for those reasons that the brief will not be a burden and may be of assistance to the Court. *See* Rule 37.1.

Therefore, should consent to filing of briefs *amicus curiae* be withheld by the parties, *amicus* respectfully requests the Court grant leave to file this brief.

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INTEREST OF *AMICUS*[1]

As a member of the bar of this Court, *amicus* is interested in the Court being fully informed of matters relevant to the decision of this case. *See* Rule 37.1.

SUMMARY OF ARGUMENT

Quo warranto brought by the United States is the only appropriate means for this Court to adjudicate the dispute underlying this case. Concerning the merits, the definition of "legal vote" implicitly advanced by Petitioners is less valid than that expounded by the Supreme Court of Florida.

ARGUMENT

1. This is a dispute regarding which individuals shall exercise the office of presidential elector representing the State of Florida. The traditional means for judicially determining disputes regarding title to office is a proceeding in *quo warranto*.[2] Therefore, *amicus* suggests that this Court should adjudicate this dispute, if at all, only in an action brought in the name and by the authority of the United States against the persons claiming title to the office of presidential elector by virtue of appointment by the State of Florida.[3] If the State were

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[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and no person other than amicus made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 502 (1933); *Smith v. Dearborn Financial Services, Inc.*, 982 F.2d 976, 981 (6th Cir. 1993) (quoting *United States ex rel. State of Wisconsin v. First Fed. Sav. & Loan Ass'n*, 248 F.2d 804, 808 (7th Cir. 1957), *cert. denied*, 355 U.S. 957 (1958)); *United States v. Billheimer*, 2000 WL 1566325, at *2, 86 A.F.T.R.2d 2000-6328, 2000-2 USTC ¶ 50,761 (S.D. Ohio Sept. 5, 2000) (discussing nature of *quo warranto*).

[3] *See, e.g., Wallace v. Anderson*, 18 U.S. (5 Wheat.) 291, 292 (1820) (holding that in the absence of a contrary statute, "no writ of quo warranto can be maintained, but at the instance of the Government"); *cf. Bush v. Palm*

impleaded in such an action, as would seem appropriate,[4] then the original jurisdiction of this Court could be invoked. U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. § 1251(b)(2).

2. At the core of Petitioners' challenge to the judgment of the Supreme Court of Florida is the vagueness of the definition of a "legal vote" that the court expounded: a ballot showing a "clear indication of the intent of the voter as determined by the canvassing board." *Gore v. Harris*, No. SC00-2431, slip op. at 23, 2000 WL 1800752 (Fla. Dec. 8, 2000) (quoting Fla. Stat. § 101.5614(5) (2000)), *cert. granted*, 531 U.S. ___ (Dec. 9, 2000). However, that standard is more definite and certain – and more firmly grounded in law enacted by the Florida Legislature – than the one that Petitioners implicitly propose, to wit: unyielding reliance upon the results obtained from machines of various designs and degrees of accuracy through which have been passed ballots punched or marked by persons of varying abilities, knowledge and habits, using devices in various states of repair and prone to various types of malfunction. Petitioners have not explained how *disregarding* those differences among the counties and citizens of Florida advances their professed goal of uniformity and fairness or is consistent with law enacted

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Beach Canvassing Bd., 531 U.S. ____, slip op. at 4 (Dec. 4, 2000) ("In the case of a law enacted by a state legislature applicable . . . to the selection of Presidential electors, the legislature [acts] by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution."); *Nebraska Territory v. Lockwood*, 70 U.S. (3 Wall.) 236 (1865) (holding that Territory could not bring *quo warranto* to question right of judge of territorial court: "A State court cannot issue a writ of mandamus to an officer of the United States. 'His conduct can only be controlled by the power that created him.'") (quoting *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821)).

[4] *See* Rule 17.2; Rules 81(b) & 19(a)(2)(i), Fed. R. Civ. Proc.; *cf. People ex rel. Boyington v. Northfield Twp. High School Dist. No. 225*, 402 Ill. 435, 439, 84 N.E.2d 553, 556 (1949) (rejecting argument that because interested private parties were powerless to commence *quo warranto* action, they therefore could not be intervenors).

by the Florida Legislature. Further, reliance on the judgment of the county canvassing boards is reasonable because they (not their machines) are likely to be most familiar with the circumstances of voting in their respective jurisdictions.

CONCLUSION

The writ should be dismissed as improvidently granted.

Respectfully submitted,

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IN THE

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GEORGE W. BUSH AND RICHARD CHENEY,

Petitioners,

vs.

ALBERT GORE, JR., *et al.*,

Respondents.

On Writ of Certiorari to the
Supreme Court of Florida

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*. This brief is filed with the consent of the parties. Counsel for the parties have filed blanket letters of consent with the Office of the Clerk.

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STATEMENT OF INTEREST OF AMICI[1]

William H. Haynes, *et al.*, are Florida residents and voters. They cast ballots in the election to decide Florida's electors in the upcoming vote of the electoral college.[2] Amici have a constitutional right under Art. II, § 1, cl. 2, to have Florida's electors appointed in the manner directed by the Florida Legislature. Amici possess a federal statutory right to have Florida appoint its electors pursuant to the statutes enacted before the date on which they cast their ballots. Amici have such a clear interest in ensuring that elections in Florida comply with the letter of the law that Florida election law gives each of them, as qualified voters and taxpayers, a right to file an election contest.

The decision below ignored the import of this Court's decision in *Bush v. Palm Beach County Convassing Board*, No. 00-836 (Dec. 4, 2000) and deprived amici of their federal constitutional and statutory rights. In this brief, amici express their views on important federal issues that affect them directly as Florida voters. Given the important national issues raised here, and the time constraints necessarily imposed on the parties, amici respectfully submit that this brief will aid the Court in its consideration of this case.

SUMMARY OF ARGUMENT

The Florida Supreme Court came within one vote of allowing the statutory scheme enacted by the Florida Legislature before election day to decide the outcome of the presidential election. Had it done so, no major constitutional confrontations or inter branch disputes would have resulted.

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1. No counsel representing a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation and submission of this brief.

2. The other participating *amici* are set out in the addendum to the brief at A1.

Instead, a bare majority issued a decision that created new law never envisioned by the Florida Legislature. That decision necessitated a sprint to this Court and substantially increased the likelihood of legislative intervention at the state and federal levels. The decision below squarely conflicts with this Court previous ruling, Art. II, § 1, cl. 2, and 3 U.S.C. § 5. This Court should reverse this decision so that Florida may return to the course mapped out by the Florida Legislature.

As this Court recognized in *Bush*, the Constitution expressly delegates plenary authority to state legislatures to determine the manner for the appointment of electors. *See* Art. II, § 1, cl. 2. The text, history and judicial interpretation of Art. II, § 1, cl. 2 all demonstrate the plenary authority of state legislatures over the appointment of electors. State-court decisions that ignore or override statutory provisions governing the appointment of electors raise issues of constitutional magnitude.

The decision below features precisely the kind of judicial overreaching Article II forbids. *See* Argument IV, *infra* at 20-30. Having rewritten the statutory deadlines in its first decision, and having failed as yet to comply with this Court's remand order in *Bush*, the court below promulgated a judge-made amendment to its judge-made deadline. It then usurped the remedial authority that the statute gives solely to the trial court and devised a remedy inconsistent with the statutory recount provisions and totally at odds with the statutory respect for the decisions of local canvassing boards.

To makes matters worse, the court below applied this new legislative scheme of its own design retroactively in contravention of 3 U.S.C. § 5. Article II grants state legislatures the preeminent role in the appointment of electors, and 3 U.S.C. § 5 imposes a limitation on retroactive lawmaking. The Florida Supreme Court's judicial lawmaking

violated both these provisions simultaneously.

The decision below also reads as if this Court never issued its *Bush* opinion. This Court noted particularly the plenary authority of the Florida Legislature under Article II and Florida's legitimate interest in having its electoral votes qualify for the safe harbor created by 3 U.S.C. § 5. Nonetheless, the Florida Supreme Court rewrote Florida election law. Despite this Court's admonition that the state constitution could not trump the federal Constitution's delegation of plenary authority to the Florida Legislature, the court below once again allowed non-statutory factors to color its statutory interpretation.

The resulting decision cannot stand. The Florida Supreme Court failed to respect the will of the people, and the decisions of the Florida Legislature, the Framers, and this Court. They fell just short of resolving this election dispute in a manner that comported with the pre-existing law of Florida and therefore would have enjoyed widespread, bipartisan respect. This Court can and should correct this momentous error.

ARGUMENT

Exercising its plenary authority, the Florida Legislature enacted a thorough and straightforward legislative scheme governing the appointment of electors. The Florida Supreme Court did not merely interpret this statutory scheme, it rewrote both statutory law and even its own judge-made law. The Florida Supreme Court set forth its own legislation, disregarding the judgments of both the Florida Legislature and this Court and substituting its own.

If this statutory scheme addressed a matter of only local concern, such judicial lawmaking could not justify this Court's intervention. But this case involves a matter of surpassing national importance. Art. II, § 1, cl. 2 prevents this judicial arrogation of the Florida Legislature's preeminent authority

over the appointment of electors. Article II reserves the manner of selecting electors to the legislatures of the several states. This Court made that point clear in *McPherson v. Blacker*, 146 U.S. 1, 23-24 (1892), and the Court foreclosed any suggestion that *McPherson* has lost any of its vitality in the last 100 years by expressly reaffirming it in *Bush*.

The Framers squarely and wisely rejected any role for the state judiciaries in determining the appointment of electors. *See infra*. Here, however, the Florida Supreme Court continues to develop new "legislation" out of thin air. As with its earlier effort, this post hoc judicial lawmaking solved nothing, but instead lengthened the window for political instability and unrest. This Court should vindicate the wisdom of the framers and reaffirm the plenary authority of the Florida Legislature.

I. THIS COURT HAS JURISDICTION TO VINDICATE PETITIONER'S AND AMICI'S FEDERAL RIGHTS TO HAVE FLORIDA'S ELECTORS APPOINTED PURSUANT TO THE RULES ESTABLISHED BY THE FLORIDA LEGISLATURE

This Court has jurisdiction over this case because the Florida Supreme Court rejected a "right, privilege, or immunity . . . claimed under the Constitution . . . or statutes of . . . the United States." 28 U.S.C. § 1257. Petitioner argued below that the Florida Supreme Court could not reject the rules imposed by the Florida Legislature and substitute its own deadlines without violating, *inter alia*, Art. II, § 1, cl. 2, 3 U.S.C. § 5, and this Court's mandate in *Bush*. The Florida Supreme Court implicitly rejected those arguments and infringed Petitioner's federal rights.

The Florida Supreme Court likewise denied Amici's rights under Art. II, § 1, cl. 2, and 3 U.S.C. § 5 to have the electors from their State appointed "in such Manner as the Legislature

thereof may direct." Art. II, § 1, cl. 2. As explained *infra*, Art. II, § 1, cl. 2, grants both Petitioner and Amici a federal constitutional right to have Florida electors in the electoral college appointed in accordance with the laws enacted by the Florida Legislature. By misinterpreting the relevant Florida statutes, ignoring deadlines clearly imposed by the Florida Legislature, and creating new deadlines out of whole cloth, the decision below deprives Petitioner and Amici of federal rights. 28 U.S.C. § 1257 vests this Court with jurisdiction to correct that denial of federally-protected rights.

Respondents' insistence that the Constitution leaves election matters to the States cannot defeat this Court's jurisdiction. This Court has emphasized that all federal elections, especially presidential elections, implicate important federal interests.[3] The more fundamental problem with Respondents' suggestion is that Art. II, § 1, cl. 2, grants authority over the appointment of electors not to the State as an undifferentiated sovereign, but specifically to "the Legislature thereof." Indeed, the gist of Petitioner's complaint is that the decision below deprived Petitioner of his federal right to have electors appointed as directed by the Florida Legislature, as opposed to the Florida Supreme Court.

As developed *infra*, Petitioner and Amici possess a federal right to have Florida's electors appointed pursuant to the

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3. *See, e.g., Burroughs v. United States*, 290 U.S. 534, 547 (1934) (acknowledging "clear" federal interest in "protect[ing] the election of [the] President and Vice President from corruption"); *Ex parte Yarbrough*, 110 U.S. 651, 666, 662 (1884) (noting federal government's "essential" interest in ensuring "that the votes by which its members of congress and its president are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice").

process established by the Florida Legislature. Although federal electors and voters in federal elections are not federal officers, they do perform a federal function. *See, e.g., Ray v. Blair*, 343 U.S. 214, 224 (1952); *Burroughs*, 290 U.S. at 545; *Yarbrough*, 110 U.S. at 662. If state laws allegedly interfere with the right to perform that federal function as permitted under federal law, this Court has jurisdiction to vindicate the federal right. In *Ray*, for example, a potential presidential elector asserted a federal right not to be bound by a state law requirement that electors pledge to support the candidate nominated by the party's national convention. Although the Court ultimately rejected the asserted federal right, it asserted jurisdiction "based on this federal right specifically claimed by respondent." *Ray*, 343 U.S. at 216 (citing 28 U.S.C. § 1257(3)). Here, Petitioner and Amici claim the federal right to have the Florida electors appointed according to the process established by the Legislature. That claimed federal right vests this Court with jurisdiction.

Respondents suggest that this Court lacks jurisdiction to review what is essentially an issue of state law. In a variety of contexts, however, this Court will wade into state-law disputes when necessary to vindicate federal rights. For example, on numerous occasions, this Court has intervened to vindicate a litigant's federal right to have state courts give a prior state or federal-court judgment full faith and credit.[4] In such cases, this Court reviews the asserted deprivation of a federal right, even

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4. *See, e.g., West Side Belt R.R. Co. v. Pittsburgh Constr. Co.*, 219 U.S. 92, 99 (1911); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 641 (1900); *Crescent City Live-Stock Landing & Slaughter-House v. Butchers' Union Slaughter House & Live-Stock Landing Co.*, 120 U.S. 141, 146 (1887); *Dupasseur v. Rochereau*, 88 U.S. 130, 134-35 (1874).

though it generally requires the Court to undertake an extensive analysis of the state law of judgments.

This Court also exercises jurisdiction to ensure that a state-law interpretation of a state tax provision does not deny a federal entity's immunity from state taxation. In *Diamond Nat'l Corp. v. State Bd. of Equalization*, 425 U.S. 268 (1976) (per curiam), this Court held a national bank immune from state and local sales taxes, despite the state supreme court's state-law determination that the incidence of the tax fell on a non-federal party. As the dissent acknowledged, "[s]ince the case involves a federal claim of immunity from state taxation, we are not bound by the California court's determination." *Id.* at 269 (Stevens, J., dissenting).

This Court has not hesitated to intervene when States set the rules for federal elections in a manner that allegedly violated federal law.[5] *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 28 (1968); *McPherson*, 146 U.S. at 23-24. In *Williams*, for example, the Court emphasized that although the States enjoyed "extensive power . . . to pass laws regulating the selection of electors," such "powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." 393 U.S. at 29.

In short, there is nothing objectionable or anomalous about this Court reviewing a state-law determination to ensure that the court below did not interpret state law in a manner that

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5. Indeed, at least one court has gone so far as to treat laws enacted by state legislatures pursuant to their authority under Art. II, § 1, cl. 2, as federal laws. *See Case of Electoral College*, 8 F. Cas. 427, 432-34 (C.C.D.S.C. 1876) (partially unpaginated). That view of the laws in dispute would remove any doubt as to this Court's authority to engage in plenary review to ensure that the decision below correctly interpreted the provisions adopted by the Florida Legislature to govern the appointment of electors.

infringed on rights, privileges, or immunities claimed under the Constitution or statutes of the United States. 28 U.S.C. § 1257 grants this Court jurisdiction over such cases, and this Court has exercised that jurisdiction in cases raising issues of far less importance to the federal government and federal Constitution.

II. THE COURT BELOW DEPRIVED PETITIONER AND AMICI OF THEIR FEDERAL RIGHT TO HAVE FLORIDA'S ELECTORS APPOINTED ACCORDING TO THE RULES ESTABLISHED BY FLORIDA'S LEGISLATURE

A. The Constitutional Text, History, and Subsequent Judicial Decisions All Give the Florida Legislature, not the Florida Courts, Authority over the Appointment of Electors.

In *Bush v. Palm Beach County Canvassing Board*, this Court confirmed the plenary authority of Florida's Legislature to determine the manner of appointing electors. *Bush*, slip op. at 4-5. That decision comports with the text of Art. II, § 1, cl. 2, the history of that provision's framing, and the prior decisions of this Court and other state and federal courts. When a state Legislature enacts laws to govern the appointment of electors, it exercises authority under Art. II, § 1, cl. 2. *See, e.g., id.*; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995). A state court that fails to respect the Legislature's enactments and rewrites them in the service of its own view of the proper method for appointing electors reverses the allocation of authority expressly provided by Art. II, § 1, cl. 2. Such judicial legislation concerning the appointment of electors is not merely an unfortunate instance of judicial activism – it violates the federal Constitution.

Art. II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a

Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." This provision lodges authority not simply in the States but uniquely in the state legislatures. The Constitution does not leave the States free to decide how to allocate authority over appointment of electors among their various branches of government. By resolving this question for each State, the Constitution pre-empts any state-law separation of powers debate. Whatever may be the division and balance of power among a State's branches of government on other matters, Art. II, § 1, cl. 2 guarantees that the appointment of electors remains under the control of the state legislature. *Cf. Hawke v. Smith*, 253 U.S. 221 (1920) (rejecting Ohio's efforts to transfer the constitutional role of the state legislature in the amendment ratification process to the people in a referendum).

The history of the framing of Art. II, § 1, cl. 2 confirms what its text makes clear. Although the Framers disagreed as to the optimal method for selecting electors, they all agreed that the selection of electors was not a proper business for the state courts. The record of the framing and subsequent judicial decisions all confirm that the state legislature enjoys the primary authority over the appointment of electors, and in a dispute between the state legislature and the state courts, the legislature must prevail.

The Framers' express delegation to the state legislatures represented a deliberate and thoughtful accommodation of the views of those who favored direct popular election, those who favored election by the state legislatures, and those who preferred election by Congress. *See McPherson*, 146 U.S. at 28. The delegation also avoided subsidiary disagreements over whether States should apportion electoral votes by district or on a winner-take-all basis. *See id.* As this Court summarized

in *McPherson*: "The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed." *Id.* While the Framers disagreed about the best method for choosing a President, they were of one mind that lodging such authority in the judiciary "was out of the question." Madison, July 25, 1787 (*reprinted in* 5 Elliot's Debates on the Federal Constitution 563). The impropriety of a judicial role was so clear to the Framers that it did not merit serious discussion. "The state judiciaries had not been, and he presumed would not be, proposed as a proper source of appointment." *Id.* at 564.

The early history of the Republic confirmed the preeminent role of the state legislatures in the appointment of electors. Although the electoral college did not function as the Framers envisioned in all its particulars, the state legislatures did exercise plenary authority over the appointment of electors in accord with the original design. From the beginning, "various modes of choosing the electors were pursued," and "[n]o question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt." *McPherson,* 146 U.S. at 29. Indeed, appointment by the legislature itself, with no popular vote at all, was a common practice in the Nation's early history. *See id.* at 29-32; *see also, e.g.,* J. Story, Commentaries on the Constitution § 1466 (1833). The Florida Legislature, for example, directly appointed electors as late as 1868. *See McPherson*, 146 U.S. at 33. Despite this diversity of appointment methods, no record appears of any attempt by a state court to impose its view concerning the manner for the appointment of electors upon the legislature. *See id.* at 35 (noting that "our attention has not been drawn to any previous

attempt to submit to the courts the determination of the constitutionality of state action").

McPherson and *Bush* leave no doubt that the plenary and exclusive power concerning the appointment of electors resides in each State's legislature, and not any other branch of state government. In *McPherson*, the Court recognized that "the sovereignty of the people is exercised through their representatives in the legislature." 146 U.S. at 25. As a result, the Court reasoned that the state legislatures logically would possess authority over the appointment of electors even if Art. II, § 1, cl. 2, allocated that power to the States generally without specifying its delegation to the state legislatures. *See id.*[6] Accordingly, Art. II, § 1, cl. 2 expressly prevents a state court from overriding the state legislature's procedures and deadlines for appointing electors or otherwise "attempt[ing] to circumscribe the legislative power."

When Florida's Legislature enacted the statutes governing the appointment of electors, it exercised its plenary authority derived from Art. II, § 1, cl. 2's specific command. Under that clause, neither the Florida Supreme Court nor any other instrumentality of the Florida government has any right to determine the manner in which Florida's electors are appointed.[7] Whatever may be the division and balance of

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6. This reasoning, however, does not render the specific delegation to the state legislatures a nullity. As the Court explained, "the insertion of those words [specifying that such power resides in each legislature], operat[es] as a limitation upon the state in respect of any attempt to circumscribe the legislative power." 146 U.S. at 25.

7. To be sure, the Florida legislature can assign a role to the Florida Supreme Court. When, as here, the parties dispute whether the Florida Supreme Court has exercised an implicitly delegated statutory interpretation function or arrogated authority that the

power under the constitution or laws of Florida in other contexts, Article II makes the Florida Legislature supreme over the Florida courts in the matter at hand. By rewriting the Legislature's enactments below in the service of its own view of the proper method for appointing electors, the Florida Supreme Court reversed the allocation of authority expressly provided by Art. II, § 1, cl. 2. As explained *supra,* such state-court judicial legislation concerning the appointment of electors does not merely raise issues of state law – that practice violates the federal Constitution.

In striking contrast to the Florida Supreme Court's arrogation of authority to decide the manner in which Florida's electors should be appointed, other States' supreme courts have confirmed the primacy of the state legislature in such disputes. *See, e.g., State ex rel. Beeson v. Marsh,* 34 N.W.2d 279, 286 (Neb. 1948) (rejecting claim that legislature's chosen method of selecting electors violated state constitution and holding that legislature's power under Article II was, in any event, plenary); *In re Opinions of Justices,* 45 N.H. 595, 1864 WL 1585, at *5 (N.H. July 19, 1864) ("[t]he whole discretion as to the manner of the appointment is lodged, in the broadest and most unqualified terms, in the legislature"); *In re Opinion of the Justices,* 113 A. 293, 298 (N.H. 1921) (reaffirming the court's 1864 opinion and holding that "[a]s the manner of making the appointment is left to the Legislature of each state, there can be

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Florida Legislature never intended to delegate, the Florida Supreme Court cannot have the last word as to whether the Florida Supreme Court acted *ultra vires*. If Petitioner is correct that the Florida Supreme Court exercised an authority never delegated to it, then the decision below represents a deprivation of federal constitutional rights that cannot be left unremedied.

no constitutional objection to the scheme now proposed").[8]

The limited federal case law confirms the plenary authority of the state legislature. The decision in *Case of Electoral College*, 8 F. Cas. 427 (C.C.D.S.C. 1876) (partially unpaginated), an extraordinary habeas corpus case arising out of the disputed presidential election of 1876, demonstrates that a state court's interference in a dispute concerning the appointment of electors clearly abridges the state legislature's preeminent authority under Art. II, § 1, cl. 2. South Carolina law vested state election officials with the authority not only to collect and tabulate votes, but also to decide "all cases under protest and contest that may arise," and to certify their determination of the election to the secretary of state by a certain date. *See* 8 F. Cas. at 431. The resolution of such protests and issues as arose evidently displeased some elements within the South Carolina government, because the state supreme court ordered the officials simply to aggregate the local returns and to report the total, without looking beyond the face of the returns or considering any protests or contests. After the officials had certified their determination of the election in accordance with their independent performance of their statutory duties, the state supreme court ordered them to certify a contrary determination. When the officials refused on the ground that having adjourned *sine die*, they no longer constituted a canvassing board and had no authority to do as the court ordered, the court held them in contempt and imprisoned them.

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8. *See also* 10 Annals of Cong. 131-146 (1800) 130 (Sen. Pinckney: "if it is necessary to have guards against improper elections of Electors, and to institute tribunals to inquire into their qualifications, with the State Legislatures, and with them alone, rests the power to institute them, and they must exercise it").

The federal court granted the writ of habeas corpus. The federal court first held that the officials' actions were "in pursuance of a law of the United States," *id.* at 434, because the officials' powers and duties under the statutes of South Carolina were "derived directly" from Art. II, § 1, cl. 2, *id.* at 432. The South Carolina legislature, "in obedience to that provision, ha[d] by law directed the manner of appointment of the electors," and "that law ha[d] its authority solely from the constitution of the United States." *Id.* at 433. The corollary of the court's holding that the officials' actions were authorized by Article II was that "the whole matter was beyond the jurisdiction of the supreme court" and the officials "were in no wise subject to the control . . . of the judicial department." *Id.* at 433-34. The state supreme court's attempts to interfere with the officials' performance of their statutory duties therefore were void, and the officials were entitled to release.

B. The Decision Below Violated Article II, Section 1, Clause 2 By Usurping the Florida Legislature's Authority.

Pursuant to its plenary authority, the Florida Legislature has enacted a comprehensive statutory scheme governing the manner in which Florida's electors shall be appointed. As detailed above, Art. II, § 1, cl. 2, obligated the Florida Supreme Court to respect the Legislature's exercise of its plenary power. Nonetheless, the Florida Supreme Court disregarded that obligation and created yet another set of entirely new rules of law to govern the appointment of Florida's electors.

The Florida Supreme Court's exercise of power is incompatible with the Florida Legislature's plenary authority and Art. II, § 1, cl. 2 of the Constitution. The decision below does not reflect a customary exercise in statutory interpretation. To the contrary, the court below rewrote the relevant statutes

in a manner that clearly usurped the Florida Legislature's authority under Art. II, § 1, cl. 2.

Of course, even a blatant exercise of judicial lawmaking by a state court under the guise of the interpretation of a state statute would not justify this Court's intervention, absent a violation of a federal right. But as explained above, Art. II, § 1, cl. 2's delegation of plenary authority over the appointment of federal electors to the state legislature converts an otherwise merely regrettable exercise in judicial lawmaking into a constitutional violation. In the context of a federal election for the appointment of electors,[9] this Court possesses jurisdiction to correct the Florida Supreme Court's misinterpretation and to vindicate Petitioner's and Amici's rights to have electors appointed pursuant to the laws enacted by the Florida Legislature. To do so avoids a constitutional violation and vindicates rights claimed under the federal Constitution.[10]

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9. By vindicating the federal constitutional right to have the appointment of presidential electors determined as directed by the state legislature, this Court would not necessarily disturb the Florida Supreme Court's misinterpretation of § 102.111 when it comes to state elections. This Court possesses jurisdiction only to vindicate federal constitutional rights, which in the unique context of Art. II, § 1, cl. 2, requires state courts to interpret state law concerning the appointment of electors correctly.

10. The blatant nature of the Florida Supreme Court's error obviates the need to decide whether a state court's interpretation of a state law concerning the appointment of electors need be grievously wrong or merely erroneous to justify this Court's intervention. Amici submit, however, that this Court possesses jurisdiction to vindicate any error in the interpretation of such laws for at least two reasons. First, Art. II, § 1, cl. 2 gives Petitioner and Amici a right to have electors appointed as directed by the state legislature. Close does not count. Second, laws enacted by state legislatures pursuant to their authority under Art. II, § 1, cl. 2, are properly construed as federal law, rather

III. SECTION FIVE OF TITLE THREE PREVENTS THE FLORIDA SUPREME COURT FROM REWRITING THE LAWS GOVERNING THE APPOINTMENT OF ELECTORS AFTER ELECTION DAY

The Constitution specifically grants state legislatures the plenary and exclusive authority to appoint electors. U.S. Const., Art. II, § 1, cl. 2. In accordance with this constitutional command, Congress has vested state legislatures with the authority to prescribe the procedures for appointing electors. *See* 3 U.S.C. §§ 2, 5, 7. Federal law – both constitutional and statutory – therefore clearly vests state legislatures, not state courts, with the sole authority to set the procedures governing the appointment of electors.

A number of provisions of federal law reflect the preeminent role of state legislatures. For example, 3 U.S.C. § 2 recognizes the state legislature's authority, in a case when the State fails to make a valid choice on election day, to appoint electors "*in such a manner as the legislature of such State may direct.*" (emphasis added); *see also* 3 U.S.C. § 7 (granting state legislatures authority regarding the meeting and voting of electors). Congress has recognized that the Constitution vests state legislatures, not state courts, with the authority to frame such election procedures.

Congress not only recognizes the preeminence of state

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than state law. *See Case of Electoral College,* 8 F. Cas. 427 (C.C.D.S.C. 1876). Accordingly, deference or a demand for a particularly egregious violation play no role. Of course, even though this Court possesses jurisdiction to correct all errors, it can limit its exercise of that jurisdiction to cases, like this one, that involve egregious misinterpretations of state law (and, therefore, clear violations of federal rights).

legislatures, it also reinforces the value of setting election rules before election day. *See* 3 U.S.C. § 5. That section states in pertinent part: "If any State shall have provided, *by laws enacted prior to the day fixed for the appointment of the electors* [this year, November 7th] for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State . . . such determination made pursuant to such law so existing on said day. . . shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution." (emphasis added).

This section ensures that if a State has a procedure in place before election day, a determination made in any controversy pursuant to that procedure "shall be conclusive, and shall govern in the counting of electoral votes." 3 U.S.C. § 5. Here, the Florida Supreme Court has usurped the Florida Legislature's authority by "enacting" new law after the election to replace the governing law that was duly enacted by the Florida Legislature prior to election day. These actions by the Florida Supreme Court violate not only Article II, § 1, cl. 2 of the United States Constitution but also 3 U.S.C. § 5.

A. The Florida Supreme Court Impermissibly Rewrote the Law Governing the Appointment of Electors After Election Day.

The Florida Legislature enacted a procedure long *before* election day to govern the appointment of the electors. The decision below rewrote those procedures long *after* the votes were cast. That post-hoc judicial lawmaking violated Art. II, § 1, cl. 2 and 3 U.S.C. § 5, as well as the broader maxim that "[e]lections belong to the political branch of the government and . . . are beyond the control of judicial power." *Roe v. Alabama*, 43 F.3d 574, 577 (11th Cir. 1995).

The Florida Legislature has enacted detailed provisions

governing elections. Those statutes provide for the "final determination of any controversy or contest concerning the appointment of any or all electors. . . ." *See* 3 U.S.C. § 5. The decision below ignored this procedure in favor of a system of the court's own devising that was not promulgated until after the statutory deadline had passed. This post-election rewriting of the rules by the Florida Supreme Court has created disarray by changing the rules after the game was over.

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). A key element to any system of fair elections is that the governing authority – here, the Florida Legislature pursuant to Art. II, § 1, cl. 2 – must set the rules in advance. Senator Samuel Smith colorfully described the obvious and special dangers of such a post-election "law to be passed for the occasion" almost two centuries ago in the context of the disputed election of 1800. 1 Dec. 1803, Annals 13:129 (reprinted in 5 Founders' Const. at 453). Senator Smith warned that if it had been attempted to "elect[ ] a President by a law to be passed for the occasion, . . . the person, whoever he might have been, would have met the fate of an usurper, and his head would not have remained on his shoulders twenty-four hours." *Id.* The Florida Supreme Court disregarded both the substantial regulations enacted by the Florida Legislature and Senator Smith's admonitions about the substantial dangers of such retroactive lawmaking.

Art. II, § 1, cl. 2, delegates policy judgments regarding the

selection of electors to the Florida Legislature and 3 U.S.C. § 5 requires those policy judgments to be made before election day. By revisiting those policy judgments, the court below reconsidered the Florida Legislature's judgments and violated both of these provisions of federal law.

B. In Light of Art. II, § 1, cl. 2 and 3 U.S.C. § 5, It Makes No Sense to Allow the Florida Supreme Court To Rewrite the Law Governing the Appointment of Electors After Election Day.

As explained above, Art. II, § 1, cl. 2 prevents the Florida Supreme Court from usurping the Florida Legislature's authority to direct the appointment of electors, and 3 U.S.C. § 5 imposes an additional federal obstacle to judicial lawmaking after election day. Together these provisions clearly belie the proposition necessarily advanced by Respondents: that the Florida Supreme Court possesses the exclusive authority to dictate the content of the law governing the appointment of electors after election day. This suggestion turns federal law on its head.

Art. II, § 1, cl. 2 clearly gives state legislatures a preeminent role in determining the appointment of electors. Section 5 then imposes a sensible non-retroactivity principle. Courts generally interpret statutes in a manner that sets their meaning retroactively. That, however, does not permit state courts to escape the limitations imposed by the Constitution and federal law. Respondents' implicit theory is that when a state court errs in interpreting statutory provisions for appointing electors it neither usurps legislative authority nor creates new law. In fact, such an erroneous decision does both, in clear violation of Art. II, § 1, cl. 2, and 3 U.S.C. § 5.

Respondents' view ignores constitutional text and history. It takes the one branch of state government the Framers

thought wholly unsuited for direct participation in the appointment of electors and not only gives it pride of place, but insulates its errors from review. Respondents' view makes hash out of a straightforward delegation of plenary authority over the appointment of electors to state legislatures. The Constitution authorizes this Court to review and correct erroneous judicial constructions of statutes governing the appointment of electors. This Court should exercise that authority and correct the Florida Supreme Court's erroneous decision or defer to the authority of the Florida Legislature to vindicate the meaning of its election laws as they were written.

IV. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *BUSH*, ARTICLE II, AND 3 U.S.C. § 5

The decision below conflicts not only with the established limits that Art. II, § 1, cl. 2, and 3 U.S.C. § 5 place on state courts, but also, more remarkably, with this Court's decision in *Bush*. *Bush* emphasized three principles that should have guided the Florida Supreme Court in this case. First, this Court reaffirmed that Art. II, § 1, cl. 2 gives the state legislatures plenary and exclusive authority over the process for the appointment of electors and "'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power.'" *Bush*, slip op. at 5 (quoting *McPherson*, 146 U.S. at 25). Second, this Court explained that the Constitution's direct grant of plenary authority to the state legislatures means that the state constitutions cannot override state election laws as applied to a presidential election. As a result, Florida courts must interpret the Florida election laws without allowing "the Florida Constitution [to] circumscrib[e] the legislature's authority under Art. II, § 1, cl. 2." *Id.* at 7. Third, this Court observed that 3 U.S.C. § 5 disfavors

retroactive changes in electoral laws and that "a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law." *Id.* at 6. The decision below violates each of these three principles.

First, the court below overstepped its permissible role by rewriting the Florida election code. While the Constitution clearly vests the Florida Legislature with the authority to enact contest procedures and impose deadlines, the Florida Supreme Court revised the statutory deadlines, rewrote the contest procedures, and devised entirely new procedures without any mooring in statutory text.

In its prior vacated decision, the Florida Supreme Court rewrote the statutory deadline for county canvassing boards to certify their election results. Section 102.112 imposes a mandatory deadline for the Secretary of State to certify election results received by November 14th. The Florida Supreme Court's first opinion extended the Legislature's November 14th deadline to November 26th. This Court, of course, vacated that decision. In the decision below, the Florida Supreme Court did its vacated decision one better. Not only does the court continue to ignore the Legislature's November 14th deadline, but it has now amended its original deadline and ordered the courts to include recounted ballots submitted to the Secretary of State after the deadline. "The [November 26, 2000] deadline was never intended to prohibit legal votes identified after that date through ongoing manual recounts to be excluded from the statewide official results in the Election Canvassing Commission's certification of the results of a recount of less than all of a county's ballots." *Gore v. Harris*, slip op. at 34-35. The court then ordered 215 votes from Palm Beach County that were counted after the court-imposed deadline to be

included retroactively in the certified totals. *Id.* at 34, 39.

The Florida election code not only provides deadlines for the completion of recounts and the submission and certification of results, it also prevents the inclusion of partial recounts in certified results. In the event of a recount, Fla. Stat. §§ 102.166(4)(d) & 102.166(5)(c) impose a mandatory obligation on country canavassing boards to "manually recount *all* ballots." This provision no doubt reflects a legislative concern that partial manual recounts raise concerns about unequal treatment. Despite this clear text, the court below ordered the trial court to include the results of a partial recount in Miami-Dade County. That result may or may not reflect wise policy, but it does not reflect the policy choices of the Florida Legislature. *See* Slip Op. at 36 (court below conducted its own balancing of "the need for accuracy . . . against the need for finality"). In the context of a presidential election, the Florida Supreme Court's rewriting of the election code and substitution of its own policy views for those of the Florida Legislature cannot be squared with Art. II, § 1, cl. 2.

The Florida Supreme Court also rewrote the Florida election code by arrogating remedial authority clearly and exclusively granted to the trial court. Fla. Stat. § 102.168(8) expressly grants broad discretionary authority to "[t]he circuit judge to whom the contest is presented." The Legislature provided that the circuit judge "may fashion such orders as he or she deems necessary . . . to provide any relief appropriate under such circumstances." *Id.* Here, the circuit court heard all the evidence and declined to order any remedy. As Petitioner has pointed out, *see* Pet. Stay Application at 24-25, it is not clear that the Florida Supreme Court even has jurisdiction to review the circuit court's disposition of an election contest. Despite this Court's admonition that the Florida Constitution has no

place in interpreting the election code as applied to a presidential election, the Florida Supreme Court based its jurisdiction, not on any statute, but on Art. V of the Florida Constitution. Even assuming *arguendo* that the Florida Supreme Court had jurisdiction, however, it clearly had no authority to fashion a remedial scheme from whole cloth. At most, the Florida Supreme Court, after finding a legal error in the circuit court's analysis, should have remanded so that the circuit judge – who enjoys the benefits of *both* statutory authorization and having heard all the relevant evidence – could have "fashion[ed] such orders as he . . . deem[ed] necessary . . . to provide any relief appropriate under such circumstances." Fla. Stat. § 102.168(8).

Not only did the Supreme Court lack authority to order any remedy, but its chosen remedy conflicts with the Florida election code. First, as already noted, where a recount is appropriate, Florida law requires county officials to "recount *all* ballots." *See* Fla. Stat. § 102.166(5)(c). Indeed, even the court below recognized that canvassing boards have a "mandatory obligation to recount all of the ballots in the county." *Gore*, slip op. at 30. The Florida Supreme Court claimed to honor this statutory command by ordering a statewide count of the so-called undervote. But the statute requires a recount of "all" ballots, not all ballots missed by the machine. "All" is a term of complete inclusion. Counting every ballot that fits within a certain subset of all ballots cast simply is not counting all ballots.

Likewise, in ordering a statewide recount of the undervote, the Florida Supreme Court authorized a standardless review with no mooring in any statutory text. The Florida Supreme Court's first difficulty was that the only statutory authorization for a recount is in the protest provisions included in § 102.166.

That section vests the sole authority over recounts in local canvassing boards. Fla. Stat. § 102.166(4)(c); *see also Gore*, slip op. at 47, 50-51 (Wells, C.J., dissenting). There is no analogous provision in § 102.168 authorizing courts to order recounts. Even though the only authority for recounts vests discretion in the county canvassing boards, the Florida Supreme Court faulted the circuit court for reviewing the canvassing boards' discretionary recount judgments deferentially. The Florida Supreme Court accordingly set up a system where authorized decisions by local canvassing boards to have recounts during the protest phase are reviewed by courts deferentially, while unauthorized recounts are ordered by the courts during the contest phase without any deference to the local boards. In a normal case, such a bizarre scheme would amply demonstrate the dangers of deviating from the statutory text. In this context, it also amply demonstrates a violation of Art. II, § 1, cl. 2.

In light of the complete absence of any statutory authorization for recounts at the contest stage, let alone recounts directed only at the so-called undervote, it should come as no surprise that the Florida Supreme Court had to create its remedial system out of whole cloth. Florida's election contest statute provides no clue as to who should do the recounts or how the recounts should be done. Accordingly, the Florida Supreme Court has authorized a completely standardless recount fraught with equal protection problems.

In the end, it is clear that, whatever its wisdom, the Florida Supreme Court's newly-minted election contest scheme is not the election contest procedure enacted by the Florida Legislature. *See Gore*, slip op. at 41 (Wells, C.J., dissenting) ("My succinct conclusion is that the majority's decision to return this case to the circuit court for a count of the under-

votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion").

The decision below clearly violates this Court's decision in *Bush* in a second major respect. Not even a week ago, this Court vacated the Florida Supreme Court's previous decision and admonished the Florida Supreme Court not to read the Florida Constitution as trumping the federal Constitution's delegation of primary and plenary authority over the process of appointing electors to the state legislatures. *See, e.g., Bush*, slip op. at 5 (directing the Florida Supreme Court to consider "the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power'") (quoting *McPherson*, 146 U.S. at 25).

The court below has not yet reconsidered its November 21 decision in the "further proceedings" contemplated by this Court's vacatur order. *Bush*, slip op. at 7. Indeed, in the decision below, the Florida Supreme Court brushed aside this Court's unanimous decision and continued to rely expressly on its prior opinion as if this Court's vacatur order had never occurred. *See Gore*, slip op. at 34-35. But although it has not yet addressed the federal-law objections that required the vacatur, the court below has repeated its erroneous reliance on the Florida Constitution.

Rather than taking to heart this Court's admonition concerning reliance on the Florida Constitution, the court below simply made a greater effort to disguise its use of the Florida Constitution to reinterpret the statutory scheme enacted by the Florida Legislature. Subtle evasion is no substitute for compliance.

In its first decision, the Florida Supreme Court framed its analysis based on *Boardman v. Esteva*, 323 So.2d 259, 263

(Fla. 1975), a case that openly disparaged "sacred, unyielding adherence to statutory scripture" when adherence to statutory text would impinge on "the right to vote . . . the right to speak, but more importantly the right to be heard." Relying on *Boardman,* the court began by stating that "the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases." Nov. 22 Pet. App. at 8a. After emphasizing at length the importance of the right to vote under the Florida Constitution, *see id.* at 28a-31a, the court declared that "[t]echnical statutory requirements must not be exalted over the substance of this right." *Id.* at 31a. The court then returned to *Boardman* to conclude its analysis, reiterating its belief that "the will of the electors supersedes any technical statutory requirements," and that "'[t]here is no magic in the statutory requirements.'" *Id.* at 36a (quoting *Boardman,* 323 So.2d at 267).

With the benefit of this Court's *Bush* opinion, the court below refrained from expressly invoking the Florida Constitution (except when asserting its own jurisdiction), but the substance of its analysis remained unchanged. The court simply substituted citations of its prior decisions (which expressly relied on the Florida Constitution) or vague allusions *sans* citation to broad "legislative purposes." For example, citing *Boardman,* the court again preferred to look to "the primary guiding principle" of the "will of the voters," rather than to the particular statutory provisions actually enacted by the Legislature. Slip Op. at 18. This time, the court omitted *Boardman*'s frank disparagement of statutory text, but included a long block quote of the same passage of *Boardman* that the court used to justify its approach in its vacated decision. *Compare id.* at 18-19 *with* Nov. 22 Pet. App. at 9a. Likewise, the court below asserted that "[i]n interpreting the various

statutory components of the State's election process," it was required to be mindful that "the purpose of the statute is to give effect to the legislative directions ensuring that the right to vote will not be frustrated." Slip Op. at 7-8. For this proposition the court cited *Firestone v. News-Press Pub. Co.*, 538 So.2d 457 (Fla. 1989), a case that, like *Boardman*, gave a narrowing construction to an election statute to avoid a constitutional problem. *See id.* at 459-60.

Whereas the court previously had looked to the state constitution to support broad statements such as that the election statutes must be interpreted so as "to obtain an honest expression of the will or desire of the voter," Nov. 22 Pet. App. at 30a (quotation omitted), in the decision below, the court studiously avoided any direct reference to the state constitution. Instead, the decision below purported to ascertain a "legislative policy" to the same effect. *See* Slip Op. at 19 (asserting that "[t]he clear message from this legislative policy is that every citizen's vote [must] be counted whenever possible"); *id.* at 16-17 (asserting that "[t]his election should be determined by a careful examination of the votes of Florida's citizens and not by strategies extraneous to the voting process," and that the "essential principle, that the outcome of elections be determined by the will of the voters, forms the foundation of the election code").

These changes to the form of the court's analysis, however, do not alter the reality that the court continues to rely on the Florida Constitution (or other non-statutory principles) to reinterpret the Florida Legislature's will as expressed in its duly enacted statutes. Art. II, § 1, cl. 2 does not constitutionalize citation form, so that a state court can ignore the legislative scheme if avoids direct reliance on the state constitution. Instead, Art. II, § 1, cl. 2 grants the state

legislatures plenary and exclusive authority over the process of the appointment of electors, and the state courts role in interpreting statutes governing that process is a narrow exercise in statutory interpretation. To avoid federal constitutional difficulties, the state courts must conduct their statutory interpretation with a clear focus on the statute as written. Neither the Florida Constitution nor broad principles imported from the case law provide any basis for deviating from the letter of the election code.

Indeed, the Florida Constitution has no proper role even as an interpretive principle for divining legislative intent. Principles of constitutional avoidance generally reflect a reluctance to exercise the judicial power to strike down a statute as unconstitutional and an interpretative norm that a legislature is unlikely to violate a constitutional principle they are oath-bound to respect.[11] Those principles have no application here. The Florida Supreme Court has no power to strike down a statute governing the federal election process as inconsistent with the state constitution, and the Florida Legislature is not constrained by the Florida Constitution when exercising its Art. II, § 1, cl. 2 authority. Simply put, the Florida Constitution has no legitimate place in the analysis of the court below, whether it comes in directly or through the backdoor.

The decision below also violates the third principle of this Court's *Bush* decision by not only rewriting Florida election law, but by doing so after federal election day in violation of 3

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11. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council,* 485 U.S. 568, 575 (1988) ("The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it").

U.S.C. § 5. The decision below has frustrated the Florida Legislature's desire to take advantage of § 5's "safe harbor" by changing Florida law in place prior to the election. This Court in *Bush* held that "[s]ince § 5 contains a principle of federal law that would assure finality of the States's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the safe harbor would counsel against any construction of the Election Code that Congress might deem to be a change in the law."

The decision below denied this "legislative wish" by creating an election contest procedure after the federal election day. Indeed, as explained above, the Florida Supreme Court's scheme is flatly inconsistent with the legislative scheme in place on November 7, 2000. Whatever else is true about the remarkable statewide, undervote-only, standardless recount, however, no such procedure existed as of November 7, 2000. Accordingly, the results of these newly-minted procedures will not satisfy the requirements of § 5. On the other hand, a decision that restores the statutory deadline and respects the statutorily-granted authority of the circuit court would produce a result that fell comfortably within § 5's safe harbor.

Art. II, § 1, cl. 2 grants state legislatures the preeminent role in appointing presidential electors. When a state court fashions new procedures out of whole cloth after election day, it risks not only a violation of 3 U.S.C. § 5, but also risks creating an election contest procedure that the Legislature did not and would not enact. Given the state legislature's preeminent role in determining the manner for the appointment of presidential electors, the Legislature's determination of sound policy should trump those of the state courts. The policies reflected in the Constitution and federal law do not permit state courts to have the final word on issues affecting presidential elections.

CONCLUSION

As noted at the outset, the court below came within one vote of resolving this election contest in a manner that, because of its consistency with Florida's election code, would have brought closure at last to this presidential election. Art. II, § 1, cl. 2 of the Constitution no doubt gives the Florida Legislature the power to correct the Florida Supreme Court's rewriting of the Florida election code. This Court has one last clear chance to bring closure to this election without the intervention of the Florida Legislature and without the prospect of a contentious proceeding in the U.S. Congress. This Court should seize this last clear chance and reverse the decision below.

Respectfully submitted,

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December 10, 2000.

ADDENDUM

Participating *Amici*

The following individuals, who reside in Florida, voted on November 7, 2000, in Florida, in the presidential election contest, and are amici whose interests are presented for the Court's consideration in this brief:

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Dec 10, 2000

No. 00-949

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of The United States

GEORGE W. BUSH

Petitioner,

v.

ALBERT GORE, JR., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF ROBERT HARRIS, STEVEN MEDINA AND OTHER FLORIDA VOTERS AS *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF ROBERT HARRIS, STEVEN MEDINA AND OTHER FLORIDA VOTERS AS *AMICI CURIAE*

Due to the time constraints in filing briefs in this matter, *amici curiae* were not been able to contact Petitioner to ascertain his position on their participation. We are therefore filing this motion for leave to file this brief. Respondents have consented to the filing of this brief.

Respectfully submitted,

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Counsel for *Amici Curiae*

December 14, 2000

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TABLE OF CASES AND AUTHORITIES

CASES Page

Bush v. Palm Beach County Canvassing Board, No. 00-836, U.S. Sup. Ct., Dec. 4 4

UNITED STATES CONSTITUTION

Article II of the United States Constitution ..... *passim*

STATE STATUTES AND REGULATIONS

Fla. Stat. 101.65 ..... 7, 9
Fla. Stat. 101.67 ..... 7, 9, 10
Fla. Admin. Code 1S-2.013 8

IN THE

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BRIEF *AMICUS CURIAE* OF ROBERT HARRIS, STEVEN MEDINA AND OTHER FLORIDA VOTERS AS *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* are all voters of Florida. They brought two actions in the Circuit Court of the Second Judicial Circuit for Leon County, Florida, contesting the certification by the State of Florida Election Canvassing Commission and Secretary of State of the election of the electors of George W. Bush and Richard Cheney. These actions were removed to the United States District Court for the Northern District of Florida and

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation or submission of this brief.

consolidated. *Harris v. Florida Elections Canvassing Commission,* Nos. 4:00-CV-453-MP; 4:00-CV-459- MP. Judgment was entered for the defendants and the cases are on appeal to the Court of Appeals for the Eleventh Circuit. *Harris v. The Florida Elections Canvassing Commission,* No.00-16423-G.

The issue in these consolidate contest actions is whether the regulation of the State of Florida allowing the counting of overseas ballots until 10 days after election day is valid even though it is directly inconsistent with two Florida statutory provisions. Defendants have raised as a defense that the regulation was issued in response to a consent decree entered between the Florida Department of State and the federal government and was approved by a federal district court. The case therefore raises the issue whether a regulation issued by an executive agency of the Florida government and approved by a federal court is consistent with Article II, Section 1, clause 2 of the United States Constitution which provides for the choosing of presidential electors "in such Manner as the Legislature may direct." Since this issue is directly involved in the present case before this Court, *amici curiae* respectfully request leave to file a brief in this action. *Amici curiae* believe that it will be helpful to the Court to ascertain the effect of the Court's ruling in the present case on other pending litigation which will also significantly affect the outcome of the presidential election.

SUMMARY OF ARGUMENT

George W. Bush has taken inconsistent positions on the issue of whether the state legislatures have the exclusive power to determine the manner in which presidential elections are conducted. His position changes on the issue depends on how it will affect the outcome of the Florida Presidential Election.

ARGUMENT

In *Bush v. Palm Beach County Canvassing Board*, No. 00-836, the Florida Supreme Court determined a new date for the submission of election results of the county canvassing boards on the ground that this determination was necessary to reconcile various provisions of Florida election law. In his appeal to this Court from that decision, Governor George W. Bush (hereafter "Governor Bush") argued strenuously to this Court that Article II, Section 1, clause 2 of the United States Constitution provides that state legislatures have the exclusive power to determine the manner in which presidential elections are conducted. Thus, Governor Bush stated: "Article II of the Constitution * * * invests the authority to regulate the manner of appointing presidential electors in state legislatures." Brief for Petitioner, *Bush v. Palm Beach County Canvassing Board*, U.S. Sup. Ct., No. 00-836, p. 14. He continued: "The Framers deliberately chose to invest the power to determine the manner of choosing electors in this particular branch of state government, thereby excluding the exercise of such power by the other branches." *Ibid.* Governor Bush further argued (Reply Brief for Petitioner, p. 6):

> [T]he Constitution vests the authority to "direct" the "Manner" of appointing electors in each State in "the Legislature thereof." * * * Where the Constitution spells out the agency of the State that is assigned a particular function, fulfillment of the constitutional design requires that such a designation be afforded legal meaning.

Similarly, in his Emergency Application for a Stay in *Bush v. Gore*, U.S. Sup. Ct., No. 00-A504, Governor Bush argued (pp. 23, 27-28):

> The Framers expressly granted the legislatures of the several States plenary power over the appointment of electors, providing that each State shall choose electors

> "in such Manner as the Legislature may direct." U.S. CONST., art. II, 1, cl. 2. As this Court has recognized, the Constitution "leaves it to the legislature *exclusively* to define the method of effecting the object [of appointing electors]." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (emphasis added [by Governor Bush]). Indeed, the Framers' "insertion of those words" in Article II–"in such Manner as the Legislature . . May direct"–undeniably "operates as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Bush*, Exh. D at 5 (Dec. 4, 2000) (quoting *McPherson*, 146 U.S. at 25).
>
> * * *
>
> In light of the Constitution's precise distinctions among state legislative, executive and judicial powers, the Framer's decision to vest specific authority in state legislatures must be understood to be exclusive of state executive or judicial; power to prescribe the "manner" of appointing electors; where the Constitution assigns a particular function to a particular branch of state government, fulfillment of the constitutional design requires that such assignment be accorded legal meaning. Thus, in the absence of a clear and express delegation of the appointment power by the legislature to a coordinate branch of government, the Constitution bars the exercise of that power by any other branch.

It is therefore the position of Governor Bush that no other branch of government can determine the procedures for conducting presidential elections and that, if any other branch of government does, provide such direction, its actions are a total nullity.

This Court, in response to Governor Bush's argument in *Bush v. Palm Beach County Canvassing Board*, No. 00-836,

suggested its agreement with the Governor Bush's argument without deciding the issue. This Court stated (slip op., pp. 4-5):

> As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl.2, of the United States Constitution. That provision reads: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number or Senators and Representatives to which the State may be entitled in the Congress ..."
> Although we did not address the same question petitioner raises here, in *McPherson v. Blackner*, 146 U.S. 1, 25 (1892), we said: "[Art. II, §1, cl.2] does not read that the people or the citizens shall appoint, but that 'each State shall'; and if the words 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself."

Despite his arguments to this Court and this Court's suggestion of its agreement with this argument, Governor Bush has taken the exact opposite position in *Harris v. Florida Elections Canvassing Commission*. There, Governor Bush and the other defendants have taken the position that a state

regulation promulgated by the state executive branch controls over a statute enacted by the Florida legislature. Presumably, Governor Bush has taken this position in *Harris v. Florida Elections Canvassing Commission* because application of the regulation at issue in that case preserves votes for him in the Florida election. On the other hand, adherence to the position he has taken before this Court that the state legislature has exclusive power to determine the manner in which elections are conducted, would provide *amici curiae* with a victory in their contest to the election results. This in turn would make Vice President Gore the winner of the Florida election.

In oral argument in the district court in *Harris v. Florida Election Canvassing Commission*, counsel for plaintiffs, *amici* here, emphasized at length the inconsistency between the arguments of Governor Bush in *Bush v. Palm Beach County Canvassing Board,* No. 00-836, and in *Harris v. Florida Election Canvassing Commission.* Plaintiffs' counsel challenged counsel for Governor Bush to explain how his position was consistent. In their hour and a half of argument, counsel for Governor Bush did not even attempt to explain the inconsistency. This is not surprising since there is no possible explanation.

Before the Court of Appeals for the Eleventh Circuit in *Harris v. Florida Elections Canvassing Commission*, No. 00-16423-G, the defendants continue to adhere to a position contrary to that taken by Governor Bush before this Court. For example, Governor Jeb Bush states: "The U.S. Congress has comprehensive authority to regulate elections * * *." Answer Brief of Appellee, Governor Jeb Bush, p. 7 n.1 (December 10, 2000).

Even if the Constitution mandates that presidential elections be conducted entirely according to the directions of the state legislatures, *amici curiae* submit that it does not necessarily

follow that a state supreme court has no power to reconcile conflicting state statutory provisions. This is the normal and historic function of the courts, both state and federal. There is no reason to believe that the Constitution intended to exclude the interpretation of state legislation by a state's own courts.

However, whether or not the Florida Supreme Court had the authority to interpret the state statutes involved in *Bush v. Palm Beach County Canvassing Board,* No. 00-836, or in *Bush v. Gore*, No. 00-949, which is now pending before this Court, if this Court holds that only directions of the legislatures are applicable to presidential elections, the decision of the district court in *Harris v. Florida Election Canvassing Commission,* which holds that a state regulation promulgated by the executive branch of the state government prevails over a state statute in determining the validity of votes for president, is clearly erroneous.[2]

The statutes of the State of Florida expressly provide that all absentee ballots must be received by 7 p.m. on election day in order to be counted. Fla. Stat. 101.67(2) and 101.65. Section 101.67(2) provides:

> All marked absent electors' ballots to be counted must be received by the supervisor by 7 p.m. the day of the election. All ballots received thereafter shall be marked with the time and date of receipt and filed in the supervisor's office.

Section 101.65 sets forth the instructions that must be included with each absentee ballot. These instructions state:

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[2] A copy of this decision is set forth in the Appendix (hereafter "App.") to this brief.

> 1. VERY IMPORTANT. In order to ensure that your absentee ballot will be counted, it should be completed and returned as soon as possible so that it can reach the supervisor of elections of the county in which your precinct is located no later than 7 p.m. on the day of the election.

On the other hand, the regulation issued by the Florida Secretary of State, §1S-2.013, provides that absentee ballots shall be counted if received 10 days after the election:

> With respect to the presidential preference primary and the general election, any absentee ballot cast for a federal office by an overseas elector which is postmarked or signed and dated no later than the date of the Federal election shall be counted if received no later than 10 days from the date of the Federal election as long as such absentee ballot is otherwise proper. Overseas electors shall be informed by the supervisors of elections of the provisions of this rule, i.e., the ten day extension provision for the presidential preference primary and the general election, and the provision for voting for the second primary.

Thus, the regulation directly conflicts with two Florida statutory provisions. There is no possible way to reconcile the regulation and the two statutory provisions.

If Article II, Section 1, clause 2 of the United States Constitution requires that presidential elections be conducted pursuant to directions of the state legislatures, and if an interpretation of a state statute by the state's highest court does not satisfy this requirement as Governor Bush has repeatedly argued before this Court, surely issuance of a regulation by an executive official, here the Secretary of State, does not satisfy the Constitution. In fact, the Secretary of State had no authority

under state law to issue a regulation which was inconsistent with state election statutes.

The district court in *Harris v. Florida Election Canvassing Commission* nonetheless held as Governor Bush and the other defendants argued, that the Secretary of State's regulation was valid because it had been approved in a consent decree by the district court in 1984 in *United States v. Florida*, N.D. Fla., No. TCA-80-1055. App. 4-11. However, if the Constitution requires that the procedures for electing the president be exclusively those prescribed by the legislature, a federal court cannot determine the procedures to be used by a state. Indeed, if a state court cannot interpret a state statute to determine such procedures, it follows *a fortiori* that a federal court cannot determine such procedures.

The district court *Harris v. Florida Election Canvassing Commission* decided that the consent decree was controlling because "[t]he detailed history of the litigation before Judge Stafford reveals that the 1984 order, approving the Plan and the Plan and the Administrative Rule, was intended as a ruling that Fla. Stat. 101.67(2) was in conflict with the [Overseas Voting Rights Act] and the [Federal Voting Assistance Act] with regard to federal elections." App. 8. However, the district court in *United States v. Florida* did not hold anything. Instead, it merely approved a consent decree and then later a remedial plan which included a regulation proposed by the Secretary of State. There is no statement in the consent order or any other order of the district court in *United States v Florida* that the statute was held to be in violation of federal law. Moreover, no such ruling would have been possible. Neither of the two statutes on which the consent order was based even suggests that federal law requires that overseas absentee voters be allowed an extra 10 days after the election for their ballots to arrive. If there were any doubt on this issue, it is dispelled by the fact that 42 other states require that the votes of overseas voters arrive before the polls close on election day.

The district court stated that "it should be recognized that, as in all cases where a state statute is found to conflict with a federal statute, the state statute did not of course immediately vanish from the books." App. 8. Here, the fact that the statute has not disappeared from the books in the ensuing 16 years demonstrates that the State of Florida, at the least, did not regard the statute as having been held in violation of federal law. Indeed, the statute has been reenacted every two years by the Florida legislature.[3/]

The regulation was adopted in 1984 to alleviate a problem caused by Florida's holding of a first and second primary in the fall before the general election. This had resulted in leaving too little time after the second primary to allow ballots to be mailed to overseas voters and to be returned by them by election day. The consent decree in *United States v. Florida* stated that 35 days were needed, in total, for these purposes. Subsequent to the adoption of the regulation in 1984, the Florida Legislature remedied the situation giving rise to *United States v. Florida*. It adopted legislation, Fla. Stat. 101.62, which provides for 45 days so that ballots can be provided to and returned by overseas voters in time for their ballots to be received by 7:00 p.m. on election day as required by Fla. Stat. 101.67(2) and 101.65. Thus, if the Florida statutes were ever invalid, they have been cured and the regulation promulgated to correct any prior problem has in effect been voided by a subsequent legislative action.

[3/] Florida Attorney General Robert Butterworth represented to the United States Supreme Court that, "Every two years, the Florida Legislature reenacts its entire set of statutes, renewing and readopting all Florida statutory law - including the state's election laws. Sections 11.2421 and 11.2422." Brief of Respondent Butterworth in the Supreme Court for the United States (Case No. 00-836), p. 19.

CONCLUSION

For the foregoing reasons, we urge this Court to be attentive to the fact that its decision in this case will affect other pending litigation concerning the outcome of the Florida Presidential Election. We also urge this Court to be aware that Governor Bush has taken contrary positions on the main issue before this Court depending on the affect it will have on the outcome of the election.

Respectfully submitted,

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Counsel for *Amici Curiae*

December 14, 2000

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Robert Harris, et al.

VS CASE NO. 4:00cv453

Florida Election Canvassing
Commission, et al.

JUDGMENT

Plaintiffs are not entitled to relief under Fla. Stat. 102.168 or any other provision of state or federal law. Judgment is entered for the defendants. All motions not expressly ruled on in this order are severally denied as moot. Due to the time constraints involved in this case, the plaintiffs may file a notice of appeal via facsimile. However, plaintiffs are directed to send the filing fee and to meet the other procedural requirements forthwith.

ROBERT A. MOSSING, CLERK

December 9, 2000 /s/
DATE Deputy Clerk: Blair Patton

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Steven Medina, et al

Vs CASE NO. 4:00cv459

Florida Election Canvassing
Commission, et al.

JUDGMENT

Plaintiffs are not entitled to relief under Fla. Stat. 102.168 or any other provision of state or federal law. Judgment is entered for the defendants. All motions not expressly ruled on in this order are severally denied as moot. Due to the time constraints involved in this case, the plaintiffs may file a notice of appeal via facsimile. However, plaintiffs are directed to send the filing fee and to meet the other procedural requirements forthwith.

ROBERT A. MOSSING, CLERK

December 9, 2000 /s/
DATE Deputy Clerk: Blair Patton

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ROBERT HARRIS, et al.,

Plaintiffs.

vs. CASE NO. 4:00cv453

FLORIDA ELECTIONS CANVASSING
COMMISSION, et al.,

Defendants.

STEVEN MEDINA, et al.,

Plaintiffs,

vs. CASE NO. 4:OOcv459

FLORIDA ELECTIONS CANVASSING
COMMISSION, et al.,

Defendants.

ORDER

The plaintiffs in these cases originally brought suit in Florida state circuit courts challenging the counting of overseas absentee ballots received after 7 p.m. on election day. The plaintiffs in the case eventually styled 4:00cv453 originally based their complaint on alleged violations of various provisions of state and federal law. The plaintiffs in that case then filed an amended

complaint which referred only to alleged violations of state law. After the amended complaint was filed, defendant Governor Jeb Bush filed a Notice of Removal of this case to federal court.[1] The Court directed the parties in the case eventually styled 4:00cv453 to brief the issues of removal and the parties filed various memoranda, with the plaintiffs styling theirs as a motion to remand. The Court scheduled a hearing on the removal issue and also on the merits if removal were found to be appropriate. The parties then filed various memoranda motions to dismiss and motions for summary judgment addressing the merits of this case.

When the removal hearing was held, the Court was made aware of the pendency of the case eventually styled as 4:00cv459 in a Florida state circuit court, and was informed by the defendants, who were essentially the same in both cases, that the 4:00cv459 case would also be removed and that a motion to transfer the case to this Court would be made under the related case doctrine. The Court then held the hearing on removal issues regarding 4:00cv453, after which the Court found that removal was proper.[2] The Court then directed that a hearing on the merits would be held the following day, in part to allow the removal and transfer procedures in what eventually became case 4:00cv459 to take place.

The following day, before the hearing on the merits, the defendants in the case now styled 4:00cv459 indicated to the Court that a notice of removal and a motion to transfer that case to this Court pursuant to the related case doctrine had in fact been filed. The Court thus gave Mr. Terris, attorney for the plaintiffs in the case now styled as 4:00cv459, an opportunity to argue for remand. The Court then denied his motion for remand and granted the motion to transfer the case to this Court under the related case doctrine. Argument was then heard on the merits on both cases, and thus these cases are ready for adjudication.

The plaintiffs in both cases characterize their causes as arising under Florida's Election Contest Statute, Section 102.168, Fla. Stat. (2000). The plaintiffs claim, and the parties stipulated, that 2,411 absentee ballots from overseas electors (hereinafter referred to as "overseas absentee ballots") were received after election day and were included in the final certificate of election results by the Florida Elections Canvassing Commission. The plaintiffs claim that this violates Section 101.67(2) Fla. Stat. (2000), which states:

> All marked absent electors' ballots to be counted must be received by the supervisor by 7 p.m. the day of the election. All ballots received thereafter shall be marked with the time and date of receipt and filed in the supervisor's office.

Because this statute uses mandatory language like "must" and "shall", the plaintiffs urge that any absent electors' ballots, including overseas absentee ballots, must have been received by 7 p.m. on November 7, 2000, in order to be legally included in the election results.

The parties stipulated that 1,575 of the overseas absentee votes received after November 7th went for Bush/Cheney and 836 votes went for Gore/Lieberman. Thus, the overseas absentee votes received after November 7th resulted in a net gain to Bush/Cheney of 739 votes.

Additionally, the parties agreed that the certified difference between the two candidates in the state as a whole was 537 votes, in favor of Bush/Cheney. Thus, if all the overseas absentee votes received after November 7th were excluded, the result would be that Gore/Lieberman would have an advantage over Bush/Cheney of 202 votes (not considering, of course, the outcomes of the myriad other lawsuit pending around the state and federal systems).

Based on the above, the plaintiffs conclude that including the overseas absentee ballots received after election day in the final certification totals constituted "[r]eceipt of a number of illegal votes ... sufficient to change or place in doubt the result of the election" under §102.168(3)(c) Fla. Stat. (2000). Section 102.168 allows any unsuccessful candidate or any elector qualified to vote to contest, in the circuit court, the certification of election of any person to office. Section 102.168(7) entitles the contestant to "an immediate hearing" and subsection (8) states:

> The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

Based on this section of the Florida Statutes, the plaintiffs sought an order including the following relief:

A. declaring that all votes that the defendants received and counted after November 7, 2000 at 7 p. m. were illegally counted;

B. ordering that said illegally counted votes be subtracted from the certified total for each candidate in the Presidential and Vice-Presidential election;

C. ordering that a new certification as to the votes case by electors in Florida for the nominees for President and Vice-President, without any illegally case absentee ballots, be made by defendant Harris; and

D. ordering the defendant Jeb Bush, as Governor of the State of Florida, to transmit to the President of the United States Senate a corrected certificate of ascertainment as to the electors selected by the State of Florida in the Presidential and Vice-Presidential elections on November 7, 2000.

The defendants responded by arguing that the Court should not apply a hyper-technical application of the deadline in the statute but must consider the effect of the earlier litigation in United States v. Florida, No. TCA-80-1055 (N.D. Fla. 1982), the consent decrees which were entered in the case, and of the Florida Administrative Code Rule 1S-2.013(7) which was promulgated as a result of the litigation. Because this earlier litigation is crucial to the present case, a detailed discussion of the tense interplay between the United States, the district court and the legislature of Florida that was involved in that case is necessary.

In 1980, the Attorney General of the United States sued the State of Florida to enforce the provisions of the Overseas Citizens Voting Rights Act (OCVRA), 42 U.S.C. §§ 1973dd, et seq. and the Federal Voting Assistance Act (FVAA), 42 U.S.C. §§ 1973cc(b).[3] Florida was represented by its Secretary of State, the Chief Elections Officer in the State.[4] The OCVRA guarantees that citizens outside the United States have the right to register and vote absentee in federal elections in the state where they were last domiciled so long as they meet certain minimum requirements. The FVAA provides, among other things, that members of the Armed Forces and the Merchant Marine located abroad, and who are otherwise qualified to vote, have the right to vote in the state of their voting residence.

The complaint in the 1980 case alleged that because of the late scheduling of primary elections in Florida in 1980, and the fact that the counties were sending out absentee ballots only

after the conclusion of the primaries, most counties were not sending out the absentee ballots until at most 20 days before the election and in some cases not until only several days before the election. The complaint concluded that this lateness threatened to deprive these voters of their right to vote by making it impossible for them to mail in their overseas absentee ballots in time to meet the 7 p.m. deadline in Fla. Stat. §101.67(2).

In 1980, Judge Stafford entered a Temporary Restraining Order, recognizing the late mailing out of the ballots and directing that overseas absentee ballots for the federal elections of November 6, 1980 should be received and counted if they were received within 10 days of election day.

Later in the case, as the 1982 election loomed near, the State of Florida, representing by the Secretary of State,[5] reached an agreement with the United States, represented by the United States Attorney General, and entered into a consent decree covering the 1982 election. In that consent decree, the State of Florida agreed (1) to accept, for the November 2, 1982 federal elections, overseas absentee ballots received until 5 p.m. November 12, 1982; (2) to inform overseas absentee voters of the ten-day extension; and (3) to mail out the absentee ballots at least 35 days prior to the election.

The 1982 consent decree also addressed a method of achieving a lasting solution to this problem for future elections. It required the state to submit, within 60 days after the close of the 1983 regular session of the Florida Legislature, a plan of compliance which "shall effect such measures as are necessary and appropriate to permit American citizens located abroad a reasonable opportunity to return their ballots for federal primary... and general elections prior to the deadline for receipt of ballots." The consent decree also noted that

> The time period provided, within which the Plan shall be submitted to the Court, will permit the Florida Legislature to study and act on this matter. However, if the Florida Legislature does not act, a Plan of Compliance nevertheless shall be submitted by the date specified above.

After submission of the Plan of Compliance, plaintiff United States of America shall be given a reasonable opportunity to study and comment on the Plan. The Court thereupon may determine that the Plan adequately resolves the voting problems that are the subject of this litigation or may order such additional relief it determines is necessary and appropriate.

The 1983 regular session of the Florida Legislature met and passed a measure responding to the Court's order. According to a series of memoranda from Sylvia Alberdi, the Staff Analyst Director for the State Senate legislative committee that dealt with this issue (Defts. Exh. H), the Florida Legislature considered - and rejected - the 35-day deadline proposed by the district court, finding that the 35-day deadline would "place the first primary in July when a large majority of Florida citizens are away on vacation", thus "disenfranchis[ing] many more voters than the few overseas who may not return their ballots in time to be counted." Instead, the Florida Legislature passed a bill which set an earlier qualifying period for federal candidates, shortened the schedule between first and second primaries and the general election, and required that absentee ballots be mailed 30 days (as opposed to 35 days) before the general election. The memoranda at Defts. Exh. H did not indicate that it was the Legislature's desire to have a 10-day extension to the ballot receipt deadline. Instead, the memorandum characterized the 10-day extension for the 1982 election as merely "an interim solution."

After the Legislature met and failed to impose the 35-day deadline, for mailing out absentee ballots, the United States complained that the Plan did not meet the requirements of the Court's order. In February 1984, the Court issued a show cause order, directing the defendant to show cause why it submitted a Plan that did not meet the requirements of the consent decree. A hearing was held in March of 1984.

It was at this point that the memoranda at Exh. H were written, especially the one written to Howard Walton. That memorandum revealed the degree to which the state legislature had considered passing the requirements in the consent decree and revealed the tension between the legislature and the United States on these issues. For example, the memorandum indicated that the committee which considered this issue felt that the bill was "a good faith effort on the part of the State of Florida to comply with the Consent Decree" and that the "matter was discussed at length in committee." The memorandum concluded by highlighting the tension which existed between the United States and the state legislature: "Chapter 83-251 should at a minimum be allowed to stay in place for the 1984 elections to determine the effect of the changes. It does not seem equitable that the Justice Department did not take into consideration all of the efforts of the Legislature to facilitate voting procedure for overseas voters."

Despite these objections from the state legislature, the Court entered an order on June 15, 1984, essentially finding that the attempt by the state legislature to remedy the violations of the OCVRA and the FVAA was insufficient and requiring the State to submit a revised Plan which satisfied the consent decree entered in 1982. This Plan included what would eventually be called Florida Administrative Code Rule 1C-7.13, and which would eventually be renumbered as Florida Administrative Code §1S-2.013. In direct response to the direction of the

Court, the revised Plan and eventually §1S-2.013 required the 35-day advance mailing of absentee ballots and required the 10-day extension in the receipt of overseas absentee ballots in federal elections. The provisions of that rule have been followed by Florida since 1984 and were followed in the 2000 election.

The detailed history of the litigation before Judge Stafford reveals that the 1984 order, approving the Plan and the Administrative Rule, was intended as a ruling that Fla. Stat. 101.67(2) was in conflict with the OCVRA and the FVAA with regard to federal elections. Thus, that order should be read to invalidate the statute to the extent it disagreed with the order. But, it should be recognized that, as in all cases where a state statute is found to conflict with a federal statute, the state statute did not, of course, immediately vanish from the books. Instead the statute must be read in conjunction with the judicial interpretation of it.

In the typical situation, a citizen must be aware of the relevant court authority, look it up in case books, and read it in conjunction with the statute to determine the state of the law. In the 1984 order, however, Judge Stafford went one step further toward clarity and accessibility. Rather than merely putting the 35-day deadline and other requirements in an order which would reside in a law book where hopefully election officials would know to look, Judge Stafford opted for a more obviously accessible solution. He directed that the required provisions be put into the Administrative Code, where election officials and citizens will naturally refer to determine the procedures for voting.

In short, Judge Stafford ordered that the state statute would run afoul of two federal laws, the OCVRA and the FVAA, unless the administrative rule were engrafted onto the

statute. Thus, the Administrative Rule was not, as the plaintiffs characterized it, the product of a rebellious state executive branch flouting the authority of the state legislature. Instead, it was the product of the state executive branch, the authorized representative of the state in a lawsuit against the state,[6] enacting a measure to bring the state into compliance with a federally ordered mandate in a situation where the state legislature refused to do so.

Thus, to the extent that Fla. Stat. §101.67(2) conflicts with administrative rule, §1S-2.013, it is the administrative rule which must win the day. This is the opposite of the traditional interplay between the administrative code and the state statutes, but is in recognition of the fact that the administrative code mechanism was merely the expression of a federal court detailing, in an easily accessible way, the manner in which a state must remedy its statute's conflict with federal law.

The fact that this rule has been in effect, without controversy or attempt by the legislature to overrule it, is a recognition by the legislature that they were subject to the Court's authority as expressed through the administrative rule. The legislature attempted to convince the Court to take another route, including a 30-day deadline, but the Court rejected their proposal. The lack of legislative challenge to the administrative rule reveals that the legislature itself understood that the rule was part and parcel of the Court's order.

The lack of challenge also reveals a recognition that the administrative code provision was properly enacted by the state executive branch to allow the state to comply with federal law and thus that the Rule should not be read to be in conflict with the statute but instead to be engrafted onto it, to allow the entire voting procedural scheme to comply with federal law. In other words, there simply is no conflict here – giving effect to the rule

is actually giving effect to the statute, for they are parts of the same whole and, together, represent the end product of a federally ordered mandate.

In light of the above discussion, several arguments of the plaintiffs melt away. First, as alluded to above, the plaintiffs seek to have the Court consider the Administrative Rule and § 101.67(2) without regard to the context of how they came about. Thus, they argue that the statute and the administrative provision conflict, and that the administrative provision must yield. As discussed above, the administrative rule should be considered the equivalent of a federal court order detailing how a state statute conflicts with a federal statute and setting out what must be done about it. Thus, it is the statute which must yield when federal elections are involved.

Next, the plaintiffs argue that the consent decree is merely an agreement between the executive branch of the State and the United States Justice Department which cannot bind the people of Florida or the legislature. This interpretation fails for two reasons. First, when a state is sued with regard to its election laws, the proper state representative is the chief elections officer. That representative has the authority to bind the state as a whole, and not merely the executive branch. Second, the history of the litigation before Judge Stafford shows that the state legislature was not merely standing off to the side, but that it recognized its duty to attempt to participate in fashioning a remedy and was fully involved in attempting to enact statutes to satisfy the federal decree.

The plaintiffs also turn to the United States Constitution and federal statutes to find a basis for invalidating the 10-day extension. First the plaintiffs cite Article II, § 1, clause 3, which states "The Congress may determine the Time of chusing Electors, and the Day on which they shall give their Votes;

which Day shall be the same throughout the United States." As an initial matter, the Day that "shall be the same throughout the United States" is the Day that the already-chosen Electors give their votes, not the "Time of chusing" them. Thus, this clause, standing alone does not require that individual voters all choose the Electors on the same day. However, the clause does allow Congress to set the "Time for chusing" the Electors and Congress has done so. Title 3 U.S.C. § 1 states that "the electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."

The plaintiffs apparently urge that this means that every vote must be made by a voter and counted by election officials by midnight on that day. As we know from this election, while it is possible for everyone to vote on election day, it is highly unlikely that every precinct will be able to guarantee that its votes would be counted by midnight on election day. This has been the case for years, yet votes are not routinely being thrown out because they could not be counted on election day.

The Court notes that Judge Stafford's orders and the Administrative Rule were careful to require that the votes to be counted be mailed or signed by election day. In other words, overseas absentee voters, like all the rest of the voters, cast their votes on election day. The only difference is when those votes are counted. Thus, this case comes down to having very little difference from the typical voting and vote-counting scenario. Routinely, in every election, hundreds of thousands of votes are cast on election day but are not counted until the next day or beyond.

The federal government has surely been aware of this practice, and has surely been aware of the eight states around the

country which allow post-election-day acceptance of absentee ballots. However, no state has been sued by the federal government for such practices, which lends further support to the notion that Congress did not intend 3 U.S.C. § 1 to impose irrational scheduling rules on state and local canvassing officials, and certainly did not intend to disenfranchise voters whose only reason for not being able to have their ballots arrive by the close of election day is that they were serving their country overseas.

For the above reasons, it is hereby

ORDERED AND ADJUDGED:

1. Plaintiffs are not entitled to relief under Fla. Stat. § 102.168 or any other provision of state or federal law. Judgment shall be entered for the defendants.

2. All motions not expressly ruled on in this order are severally denied as moot.

3. Due to the time constraints involved in this case, the plaintiffs may file a notice of appeal via facsimile. However, plaintiffs are directed to send the filing fee and to meet the other procedural requirements forthwith.

DONE AND ORDERED this 9th day of December, 2000.

/s/
MAURICE M. PAUL, SENIOR DISTRICT JUDGE

Endnotes

1. The original notice of removal in 4:00cv453 did not indicate that all defendants consented to the removal. However, the defendants quickly filed a separate notice of consent to removal which was signed by all defendants. The Court notes that notice and consent requirements have been held to be procedural rather than jurisdictional requirements. Due to the necessarily rushed nature of this proceeding, and the fact that consent to removal was quickly obtained, the Court excuses the slight procedural error of a lack of uniform consent to removal in the original notice.

2. As noted above, the first issue facing the Court involved the propriety of removing this case to federal court. Generally, the inquiry whether federal question jurisdiction exists under28 U.S.C. § 1331 is guided by the well-pleaded complaint rule, which states that 'federal jurisdiction exists only when a federal question is presented on the plaintiff's properly pleaded complaint.' Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed.2d 318 (1987)). Since a defendant may remove a case only if the claim could have been brought in federal court, 28 U.S.C. § 1441(b), the question for removal jurisdiction must also generally be determined by reference to the 'well-pleaded complaint.' Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808, 106 S.Ct. 3229, 92 L. Ed.2d 650 (1986). Moreover, if the federal issue arises only as a federal defense and does not appear on the face of a well-pleaded complaint, it as a general rule does not authorize removal to federal court. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)).

> The Court finds, however, that the plaintiffs in this case have artfully pled their case to avoid the obviously federal character of the issues they claim. Further, the Court finds that the plaintiffs' "right to relief necessarily depends on resolution of a substantial question of

federal law" Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 13, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). The plaintiffs' purported state law complaint, on its face, obviously seeks to overturn a prior federal ruling which directly covered the issues presented in the purported state law complaint.

Additionally, this case involves the deprivation of what the United States Supreme Court calls "a fundmental political right, because preservative of all rights". Yick Wo v. Hopkins, 118 U.S. 356 (1886); see also Revnolds v. Sims, 377 U.S. 533 (1964) ("Undeniably, the Constitution of the United States protects the rights of all qualified citizens to vote, in state as well as in federal elections."); Ex parte Yarbrough, 110 U.S. 651 (1884). Most recently, in Bush v. Palm Beach County Canvassing Bd., 121 S.Ct. 471 (2000), the United States Supreme Court implicitly adopted the view that this overriding concern justifies a federal court reviewing state election procedures. In its order vacating and remanding the opinion of the Florida Supreme Court, the United States Supreme Court declined to defer to the state court's interpretation of the state's own law because "the law enacted by a state legislature was applicable not only to elections for state offices, but also to the selection of Presidential electors." Our case obviously involves the same issues. For all the above reasons, this Court finds that removal of this case was appropriate.

3. For a thorough and well written history of the OCVRA and the FVAA refer to the order entered December 8, 2000 by Judge Collier in the case of George W. Bush, et al. v. Hillsborough County Canvassing Bd., et al., 3:00cv533 (Dec. 8, 2000). That history is hereby adopted and incorporated herein by reference.

4. Under Fla. Stat. § 97.012, the Secretary of State is dubbed the chief elections officer, and has the responsibility to "obtain and maintain uniformity in the application, operation, and interpretation of the registration laws." See also Consent Decree in United States v. Florida, TCA-80-1055 (entered April 2, 1982) ¶ 4. The Secretary of State has the authority to bind the State of Florida when the Secretary is the legal representative of the State in a legal proceeding. The Florida Supreme Court in State ex rel. Landis v. Thompson 163 So. 270 (Fla. 1935), recognized the authority of the Secretary to represent and bind the State over 6 decades ago:

> Furthermore, where the validity of the submission of a proposed joint resolution of three-fifths of each House of the Legislature as a proposed constitutional amendment is duly litigated by a citizen prior to its being published and voted on, the effect of a judicial decision holding the submission to be valid, and the pending publication of the amendment to be in conformity to the organic law, and refusing to enjoin it, becomes binding on the state which is represented in such litigation by its secretary of state. The state being bound by such judicial decision, it consequently becomes binding on all who claim under the state, as does the respondent in this case, and this is so even though respondent was not a direct party to such litigation, nor did he actually participate in the same. Respondent, in common with plaintiff in that suit, was privileged to intervene in such litigation. Such litigation, in its essence, contemplated a judicial decree declaratory of the validity vel non of what was being proposed as an amendment to the Constitution. As such it

> was required to be considered by the court with a view to settling in advance, not only all objections that were therein being urged, but all valid objections that might have been urged....

Id. at 277-78.

5. See fn 4, supra.

6. See fn 4, supra.

Dec 10, 2000

(10)

Supreme Court, U.S.
FILED
DEC 10 2000
OFFICE OF THE CLERK

No. 00-949

In the

SUPREME COURT OF THE UNITED STATES

GEORGE W. BUSH AND RICHARD CHENEY,

Petitioners,

v.

ALBERT GORE, JR., ET AL.,

Respondents.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF FOR THE STATE OF ALABAMA, BY AND THROUGH ITS ATTORNEY GENERAL AND SECRETARY OF STATE, AS *AMICUS CURIAE*, SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court erred in establishing new standards for resolving presidential election contests that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

2. Whether the Florida Supreme Court erred in establishing post-election judicially created standards that threaten to overturn the certified results of the election for President in the State of Florida and that fail to comply with the requirements of 3 U.S.C. § 5, which gives conclusive effect to state court determinations only if those determinations are made "pursuant to" "laws enacted prior to" election day.

3. Whether the use of arbitrary, standardless and selective manual recounts to determine the results of a presidential election, including post-election judicially created selective and capricious recount procedures, that vary both across counties and within counties in the State of Florida violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

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Opinion to the Hon. Jim Bennett, Secretary of State, Ala. A.G. Op. No. 99-00227 (May 31, 1996) <http://www.ago.state.al.us/pdfopinions/99-00227.pdf> 2

INTEREST OF *AMICUS CURIAE*

The State of Alabama, by and through its Attorney General, Bill Pryor, and Secretary of State, Jim Bennett, respectfully submits this Brief as *amicus curiae* pursuant to Sup. Ct. R. 37.4. *Amicus* submits this Brief because of the striking similarities between this case and an Alabama case decided by the United States Court of Appeals for the Eleventh Circuit five years ago, *Roe* v. *Alabama*, involving the counting of unwitnessed absentee ballots in the 1994 election for Chief Justice of the Supreme Court of Alabama. That case resulted in a series of decisions from the Eleventh Circuit holding that a post-election change in the procedures for counting absentee ballots violated the First and Fourteenth Amendments, which require state election procedures to be fundamentally fair. *See Roe* v. *Alabama*, 43 F.3d 574 (11th Cir.) ("*Roe I*") (certifying question to Supreme Court of Alabama), *remanded to district court for evidentiary hearing after certified question answered*, 52 F.3d 300 (11th Cir.) ("*Roe II*"), *cert. denied*, 516 U.S. 908, *appeal after remand to district court*, 68 F.3d 404 (11th Cir.) ("*Roe III*"), *stay denied sub nom. Hellums* v. *Alabama*, 516 U.S. 938 (1995). The Petitioner in this case expressly relied upon these decisions of the Eleventh Circuit in requesting review by this Court in both this case and the earlier decision of this Court. *See* Emergency App. for Stay at 38; Pet. Br. at 28, Pet. Reply Br. at 19, *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. ___ (2000) (No. 00-836). The State of Alabama, by and through its Attorney General, and the Secretary of State of Alabama were defendants in *Roe* v. *Alabama*. *See Roe I*, 43 F.3d at 574; *Roe II*, 52 F.3d at 300; *Roe III*, 68 F.3d at 404. The current Attorney General of Alabama, then a deputy attorney general, personally represented the State and the current Secretary of State in that litigation. *See Roe II*, 52 F.3d at 300; *Roe III*, 68 F.3d at 404; *see also Roe* v.

Mobile County Appointing Bd., 904 F. Supp 1316, 1317 (S.D. Ala.), *aff'd sub nom. Roe* v. *Alabama*, 68 F.3d 404 (11th Cir.), *stay denied*, 516 U.S. 938 (1995).

Relying on the constitutional principles applied in *Roe* v. *Alabama*, the State of Alabama reformed its election laws to ensure that Alabama courts cannot change the rules for counting absentee ballots after an election. *See* Ala. Code § 17-10-10 (Supp. 2000) ("No court or other election tribunal shall allow the counting of an absentee ballot with respect to which the voter's affidavit signature (or mark) is not witnessed by the signatures of two witnesses 18 years of age or older or a notary public (or other officer authorized to acknowledge oaths) . . . ."). The Attorney General and Secretary of State have relied on *Roe* v. *Alabama* in enforcing the election laws of Alabama, advising election officials, and ensuring that election procedures in Alabama are and remain fundamentally fair. *See, e.g.*, Opinion to the Hon. Leland Avery, Hale County Probate Judge, Ala. A.G. Op. No. 2000-180, at 4 (June 26, 2000) <http://www.ago.state.al.us/pdfopinions/2000-180.pdf> ("[T]he United States Court of Appeals for the Eleventh Circuit has held that a systematic counting of unwitnessed and unnotarized absentee ballots violates the voting rights of those voters who complied with the statutory mandates."); Opinion to the Hon. Jim Bennett, Secretary of State, Ala. A.G. Op. No. 99-00227, at 3 (May 31, 1996) <http://www.ago.state.al.us/pdfopinions/99-00227.pdf> ("In this circumstance, under the *Roe* decision, the state election officials cannot count unwitnessed absentee ballots without violating the [F]ourteenth [A]mendment.").

Having now relied on the principles of due process and equal protection applied in *Roe* v. *Alabama* for several years, *amicus* has a profound interest in seeing those principles upheld and consistently enforced. This is especially true in the unique context of the election of the

President and Vice President of the United States, in which all States have a profound interest. As this Court has acknowledged,

> in the context of a presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. . . . [T]he State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by votes beyond the State's boundaries.

Anderson v. *Celebreeze*, 460 U.S. 780, 794–95 (1983) (citations omitted).

The judgment of the Supreme Court of Florida must be reversed because that court changed the rules governing election protests and contests in Florida, in violation of Article II, § 1, cl. 2 of the U.S. Constitution, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and 3 U.S.C. § 5 (1994). *Amicus* urges this Court to uphold the First and Fourteenth Amendment guarantees of fundamentally fair election procedures so that States may not, after a presidential election, employ arbitrary standards and retroactively change their canvassing, certification, and contest procedures to alter the outcome of an election.

SUMMARY OF ARGUMENT

Because the right to vote is a fundamental right, the constitutionality of state election procedures rests on

whether those procedures are fundamentally fair. Fundamental fairness requires election officials to refrain from changing the rules for counting ballots after an election to alter the outcome. Fundamental fairness also requires each State to establish — before an election — objective and meaningful standards for counting ballots and adhere to those standards after the election to protect the First and Fourteenth Amendment rights of both voters and candidates. Adherence to these guarantees of fundamental fairness requires special deference to the authority of legislatures to establish rules for counting votes before an election rather than allowing courts retroactively to create rules for resolving post-election disputes. Because the decision of the Supreme Court of Florida violates due process, equal protection, and the First Amendment in the election of the President and Vice President of the United States, this Court should reverse that decision and enjoin the use of the arbitrary manual recounts of ballots in Florida.

ARGUMENT

I. MATERIAL POST-ELECTION CHANGES IN STATE CANVASSING PROCEDURES VIOLATE DUE PROCESS.

This Court has long held that voting is "a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). It is well established that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms. . . . Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams* v. *Rhodes*, 393 U.S. 23, 30–31 (1968). Because the right to vote is so fundamental, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). In this context, "the right

of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 554.

In 1995, the United States Court of Appeals for the Eleventh Circuit was called upon to apply these principles in *Roe* v. *Alabama*, a case involving a state circuit court's order to count absentee ballots that had not been properly witnessed or notarized in accordance with state law. The Eleventh Circuit correctly observed in *Roe I* that "federal courts do not involve themselves in garden variety election disputes. If, however, the election process itself reaches the point of fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order." 43 F.3d at 580 (citations and internal quotation marks omitted) (quoting *Curry* v. *Baker*, 802 F.2d 1302, 1315 (11th Cir.), *cert. denied*, 479 U.S. 1023 (1986), in turn quoting *Welch* v. *McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985), and *Duncan* v. *Poythress*, 657 F.2d 691, 703 (5th Cir. Unit B Sept. 1981), *cert. denied*, 459 U.S. 1012 (1982)). Like the case now before this Court, *Roe* was no "garden variety" election dispute. As in this case, the post-election change in election procedures by the state courts in *Roe* raised serious questions about the fundamental fairness of the election process. Because the situation in *Roe* v. *Alabama* was so similar to the present case, *Roe* provides an excellent analytical framework for examining the due process principles at stake in this case.

A. *Roe* v. *Alabama*

Before the November 1994 general election, it was a uniform statewide practice in Alabama to disregard absentee ballots that had not been properly notarized or witnessed. *Roe I*, 43 F.3d at 578; *Roe III*, 68 F.3d at 406–07 (stating that the district court's findings, which were

"supported overwhelmingly by the evidence," showed there had been no prior practice, in 66 of Alabama's 67 counties, of counting improperly executed absentee ballots). A state circuit court nonetheless ordered unwitnessed absentee ballots to be counted after the 1994 general election. Because the candidates for Chief Justice were separated by a mere 200 to 300 votes before the court entered its order, the order placed the outcome of the race for Chief Justice in doubt. *Roe I*, 43 F.3d at 578. As the Court is no doubt aware, the 200 to 300 vote spread in *Roe* is similar to the narrow margin separating presidential candidates George W. Bush and Albert Gore, Jr., in the election in Florida.

The Alabama court's order was challenged in a 42 U.S.C. § 1983 (1994) action brought in the United States District Court for the Southern District of Alabama. The district court promptly granted a preliminary injunction halting the counting of unwitnessed absentee ballots. In its order, the district court specifically found that it was an established practice in Alabama not to count unwitnessed absentee ballots. Moreover, the district court held that adhering to the state court order and changing the practice of not counting unwitnessed absentee ballots would violate the First and Fourteenth Amendments. *Roe I*, 43 F.3d at 579.

On appeal to the Eleventh Circuit, the *Roe* plaintiffs argued that enforcement of the state court order

> would constitute a retroactive validation of a potentially controlling number of votes in the elections for Chief Justice and Treasurer that would result in fundamental unfairness and would violate plaintiffs' right to due process of law in violation of the Fourteenth Amendment, and that this violation of the plaintiffs' rights to vote and . . . have their votes properly and honestly counted

> constitutes a violation of the First and Fourteenth Amendments.

Id. at 580 (internal quotation marks omitted). The *Roe* plaintiffs further argued "that the [state] circuit court's order requiring the state's election officials to perform the ministerial act of counting the contested absentee ballots, if permitted to stand, will constitute a retroactive change in the election laws that will effectively 'stuff the ballot box,' implicating fundamental fairness issues." *Id.* at 581 (footnotes omitted). The Eleventh Circuit agreed with the *Roe* plaintiffs and determined that departing from Alabama's longstanding policy of not counting unwitnessed absentee ballots would indeed violate the First and Fourteenth Amendments.

In deciding *Roe I*, the Eleventh Circuit held that departing from Alabama's previous practice of not counting unwitnessed absentee ballots "would have two effects that implicate fundamental fairness." *Id.* "First, counting ballots that were not previously counted would dilute the votes of those voters who met the [statutory] requirements . . . . Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the [statutory requirements]." *Id.* The court also stated that "had the candidates and citizens of Alabama known that something less than the signature of two witnesses or a notary attesting to the signature of absentee voters would suffice, campaign strategies would have taken this into account and [those] who did not vote would have voted absentee." *Id.* at 582 (distinguishing *Partido Nuevo Progresista* v. *Barreto Perez*, 639 F.2d 825 (1st Cir. 1980), *cert. denied*, 451 U.S. 985 (1981)). On these grounds — that retroactively counting improperly executed absentee ballots would disenfranchise or dilute the votes of others and that altering election rules *post hoc* would upset the legitimate expectations of the voters

and candidates — the Eleventh Circuit ruled that complying with the state court's *post hoc* change in election procedures would violate the First and Fourteenth Amendments.

The Eleventh Circuit refused to require the Roe plaintiffs to pursue their claims in state court. *Id.* at 582. The court noted that, under Ala. Code § 17-15-6 (1995), Alabama courts are jurisdictionally barred from deciding statewide election contests. The court concluded that the state legislature, which has exclusive authority to decide an election contest involving the office of Chief Justice, *see* Ala. Code § 17-15-52 (1995), was "not an adequate or proper forum for the resolution of the federal constitutional issues presented." *Roe I*, 43 F.3d at 582.

The Court of Appeals did, however, abstain from finally adjudicating the plaintiffs' claims to certify a question to the Alabama Supreme Court asking whether absentee ballots that were not properly notarized or witnessed could nonetheless be counted under Alabama law. *Id.* at 583. The Supreme Court of Alabama, in answering the certified question, affirmed the order of the state circuit court and held that unwitnessed absentee ballots in "substantial compliance" with state law should be counted. *Roe* v. *Mobile County Appointment Bd.*, 676 So. 2d 1206, 1221–22 (Ala. 1995).

Within a month of the Alabama Supreme Court's decision, the Eleventh Circuit remanded the case to the district court for trial. *Roe II*, 52 F.3d at 301. The Eleventh Circuit specifically directed the district court to address seventeen factual issues. Chief among these was the question of whether there was an established practice of including or excluding improperly executed absentee ballots in previous elections in Alabama. *Id.* at 302–03. Following *Roe II*, the defendant class of voters who sought to have their unwitnessed absentee ballots counted

petitioned this Court for a writ of certiorari. That petition was denied. *Davis* v. *Alabama*, 516 U.S. 908 (1995).

Following a three-day trial, the district court found that "the practice in Alabama prior to the November 8, 1994 election had been uniformly to exclude [improperly executed absentee] ballots." *Roe III*, 68 F.3d at 406–07. Accordingly, the district court concluded the *Roe* plaintiffs were entitled to relief and entered an order directing the Alabama Secretary of State to certify the results of the Chief Justice and State Treasurer elections without counting unwitnessed absentee ballots. *Id.* at 407. The defendant class of voters that had cast improperly executed absentee ballots then appealed to the Eleventh Circuit. *Id.*

In *Roe III*, the Eleventh Circuit concluded that the district court's findings of fact were "supported overwhelmingly by the evidence." *Id.* The appeals court also reaffirmed its holdings in *Roe I* and *Roe II*. *Id.* at 408. The court again rejected the appellants' plea to abstain and allow the state courts to decide the contested elections for Chief Justice and State Treasurer. The appellants argued, in essence, that state courts should have been given the opportunity to apply the Alabama Supreme Court's opinion in *Roe* v. *Mobile County Appointment Board* and grant them relief by ordering their improperly executed absentee votes to be counted. The Eleventh Circuit rejected this argument, again noting that it was "highly doubtful" that the state courts had jurisdiction to grant such relief given the jurisdictional bar in Ala. Code § 17-15-6. *Id.* The court determined that the Roe plaintiffs had no adequate state forum for the vindication of their federal constitutional claims and promptly affirmed the district court's order. Because time was of the essence, the Court of Appeals directed its clerk to issue the court's mandate instanter.

The defendant class of voters who wanted their improperly executed absentee ballots counted immediately applied for a stay from this Court. Justice Kennedy granted a temporary stay on October 14, 1995, while this Court considered the matter. The Court then denied the stay application on October 19, 1995. *Hellums* v. *Alabama*, 516 U.S. 938 (1995). Chief Justice Perry O. Hooper, Sr., was certified as the winner of the 1994 election and sworn into office the next day.

B. The Costs and Consequences of *Roe* v. *Alabama*

Roe v. *Alabama* ended with a reaffirmation of the guarantees of the First and Fourteenth Amendments, as interpreted by this Court, that state election procedures must be fundamentally fair. Complete justice was not done, however, because the harm caused by the state circuit court order could not be undone. Because of the state circuit court's order, Chief Justice Hooper was not certified as the winner of the November 1994 election until October 20, 1995. *See* Ala. Rptr., 656–659 So. 2d, at IX n.2. He was sworn in later the same day, more than nine months after he should have taken office on January 16, 1995. *Id.* at IX n.1. As a result of the circuit court's attempt to change the rules for counting ballots after the election, the people of Alabama were deprived of their choice for Chief Justice for more than nine months — one-eighth of his total term of office. The Eleventh Circuit's decision in *Roe* v. *Alabama* could not give those nine months back to the people of Alabama.

What is more, the incumbent Chief Justice, who lost the November 1994 election, "continued in office" during the nine months after his term expired until Chief Justice Hooper was sworn in. *Id.* The State then had to pay salaries to both men for that nine-month period.

Moreover, the litigation itself cost the State of Alabama hundreds of thousands of dollars.

The process now unfolding in Florida as a result of the change in state law by the Supreme Court of Florida portends different, but more frightening ills. The process now under way in Florida is undermining public confidence in the presidency and the Republic itself as voters across the country watch judges and State officials stare at tiny pieces of cardboard to divine whether a voter's "dimpled chad" means the voter wanted to vote for a candidate or decided not to vote at the last minute. *Gore* v. *Harris*, No. SC00-2431, slip op. at 41 (Fla. Dec. 8, 2000) (Wells, C.J., dissenting) ("I have a deep and abiding concern that the prolonging of the judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis."). If post-election changes to election procedures in Florida are approved by this Court, other states will be flooded with similar post-election litigation. Any disgruntled candidate who loses by a narrow margin will have an incentive to file an election contest, argue for a new set of rules, and then keep counting and changing the rules until the requisite votes are "found." Such untoward results are avoided when federal courts uphold the due process requirement of fair rules for counting ballots that cannot be changed after the election to alter the outcome.

C. Other Cases Invalidating *Post Hoc* Changes in Election Procedures

Roe represents an extreme example of what can happen when election procedures are changed after an election. The situation in *Roe* was not unique, however. Other circuits have intervened in the name of due process to halt similar, fundamentally unfair *post hoc* changes in election procedures.

In *Briscoe* v. *Kusper*, 435 F.2d 1046 (7th Cir. 1970), for example, the Seventh Circuit addressed a change in the petition requirements for candidates for alderman in the City of Chicago. The City Board of Election Commissioners applied a new "anti-duplication" rule to disallow voters' signatures on more than one candidate's petition to run for alderman; the Board also disallowed any signatures without a middle initial. *Id.* at 1055. The Seventh Circuit held that the Board's failure to forewarn candidates of these new, rigorous requirements violated due process. *Id.*

In *Griffin* v. *Burns*, 570 F.2d 1065 (1st Cir. 1978), the First Circuit ordered a new election after state election officials handed out absentee ballots that were later voided by the state supreme court after the election. *Id.* at 1078–80. The court observed that federal courts have intervened in state elections where

> the attack was, broadly, upon the fairness of the official terms and procedures under which the election was conducted. The federal courts were not asked to count and validate ballots and enter into the details of the administration of the election. Rather they were confronted with an officially-sponsored election procedure which, in its basic aspect, was flawed.

Id. at 1078.

In *Brown v. O'Brien*, 469 F.2d 563 (D.C. Cir.), *stay granted*, 409 U.S. 1 (*per curiam*), *vacated as moot*, 409 U.S. 816 (1972), the District of Columbia Circuit concluded that a political party's retroactive application of a new and unannounced ban on winner-take-all presidential primaries violated due process. *Id.* at 570. The court noted that, if the party had announced its rule change prior to the primaries, candidates might have campaigned differently, voters might have voted

differently, and the State of California might have altered its delegate selection scheme. *Id.* at 569–70. The court observed that "there can be no dispute that the very integrity of the process rests on the assumption that clear rules will be established and that, once established, they will be enforced fairly, consistently, and without discrimination so long as they remain in force." *Id.*

Finally, in *Duncan* v. *Poythress*, 657 F.2d 691 (5th Cir. Unit B. Sept. 1981), *cert. dismissed*, 459 U.S. 1012 (1982), the former Fifth Circuit held that state officials' refusal to hold a special election to fill a vacancy on the state supreme court in accordance with state law violated due process. *Id.* at 708. The court observed that it could "imagine no claim more deserving of constitutional protection than the allegation that state officials have purposely abrogated the right to vote, a right that is fundamental to our society and preservative of all individual rights." *Id.* at 704.

These cases underscore that the right to vote, at bottom, is a *federal* right. *See Griffin* v. *Burns*, 570 F.2d at 1077. If a state election procedure is so flawed as to be fundamentally unfair, that process violates due process. Where, as in *Roe* and in this case, a state supreme court materially changes state election, canvassing, and contest procedures after an election has occurred and requires the use of arbitrary recounts, that change is fundamentally unfair and violates the due process rights of the voters and the candidates.

II. THE JUDGMENT OF THE SUPREME COURT OF FLORIDA VIOLATES ARTICLE II OF THE CONSTITUTION, 3 U.S.C. § 5, AND THE FIRST AND FOURTEENTH AMENDMENTS.

As was the case in *Roe* v. *Alabama*, the judgment of the Supreme Court of Florida in this case substantially changed Florida election procedures after the election and applied those changes retroactively — *again*. The Supreme Court of Florida also required the use of arbitrary manual recounts that violate due process and equal protection. The dissenting opinion of Chief Justice Wells amply demonstrates the nature of the changes in election procedures made by the Supreme Court of Florida. *Gore* v. *Harris*, slip op. at 40–60 (Wells, C.J., dissenting). As Chief Justice Wells feared, by changing Florida law after the election, the Supreme Court of Florida violated the Constitution and 3 U.S.C. § 5. *See id.* at 41, 54–60 (Wells, C.J., dissenting).

A. The Judgment of the Supreme Court of Florida Retroactively Changed Florida Election Procedures — *Again*.

In *Palm Beach County Canvassing Board* v. *Harris*, Nos. SC00-2346, SC00-2348, and SC00-2349 (Fla. Nov. 21, 2000), the Supreme Court of Florida materially and retroactively changed Florida election procedures in violation of due process. *See* Br. for the State of Alabama, et al., as *Amici Curiae*, Supp. Reversal at 13–24, *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. ___ (2000) (No. 00-836). Less than a week ago, this Court unanimously vacated that judgment because there was "'considerable uncertainty as to the precise grounds for the decision.'" *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. ___, ___ (2000) (slip op. at 6) (quoting *Minnesota* v. *National Tea Co.* 309 U.S. 551, 555 (1940)). Four days later, in an appeal from Vice President Gore's

unsuccessful election contest in State court, the Supreme Court of Florida materially changed Florida law *again*, ordering the trial court to embark on a statewide manual recount of so-called "undervotes" in the presidential election.[1]

The first and perhaps most important change effected by the Florida Supreme Court's decision in this case was the acceptance of so-called "dimpled" chads as votes. Prior to the decision in this case, there was no statewide policy requiring "dimpled" chads to be counted as votes. By accepting the returns from Broward and Palm Beach Counties, where "dimpled" chads were counted as votes, the court altered state practice. After the election, the Palm Beach County Canvassing Board changed its ten-year-old policy not to count "dimpled" ballots. The board's November 1990 guidelines made clear that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote . . . an indentation is not evidence of intent to cast a valid vote." Ex. J to Emer. App. for Stay. The court's inclusion of Palm Beach County's amended returns validated this post-election change in canvassing procedure in violation of due process and 3 U.S.C. § 5.

A second major change to state law was the alteration of the standard of review applied by the circuit court. Prior to the decision in this case, the Florida courts gave great deference to the decisions made by the executive officials who implemented Florida's election laws. As noted by Chief Justice Wells, in *Krivanek* v. *Take Back*

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[1] The Supreme Court of Florida's exercise of appellate jurisdiction over an election contest involving a presidential election also runs afoul of Article II, § 1, cl. 2 of the United States Constitution. The Florida election contest statute, Fla. Stat. § 102.168 (2000), does not provide for appellate review of the trial court's decision. As grounds for its jurisdiction, the court cited only the Florida Constitution, Fla. Const. art. V, § 3(b)(5). *Gore* v. *Harris*, slip op. at 1.

Tampa Political Committee, 625 So. 2d 840 (Fla. 1993), the court stated that

> the judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law. *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975), cert. denied, 425 U.S. 967, 96 S. Ct. 2162, 48 L. Ed. 2d 791 (1976). As noted in *Boardman*:
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> > The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties. . . . [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law.

Gore v. *Harris*, slip op. at 43 (Wells, C.J., dissenting) (quoting *Krivanek*, 625 So. 2d at 844–45). In this case, however, the Supreme Court of Florida ruled that executive officials were entitled to no such deference. *Id.*

at 13–14 (holding that circuit court erred in applying abuse of discretion standard). This change in the standard of review fundamentally altered the relationship between the judicial and executive branches in the election process in Florida, arrogating power to the judiciary that had not been expressly granted by the Legislature.

A third major change wrought by the Supreme Court of Florida's decision was to authorize manual recounts of only so-called "undervotes" as part of an election contest. Florida's election contest statute, Fla. Stat. § 102.168, does not mention manual recounts; "the only procedures for manual recounts are in the protest statute," Fla. Stat. § 102.166. *Gore* v. *Harris*, slip op. at 45 (Wells, C.J., dissenting). The majority concluded that the contest statute's broad grant of authority "to provide any relief appropriate under such circumstances," Fla. Stat. § 102.168(8), included the ability to order manual recounts. *See id.* at 37–38. Even assuming, *arguendo*, that this conclusion was a proper interpretation of legislative intent, the Supreme Court of Florida rewrote the manual recount provisions by authorizing a manual recount of only *certain* ballots.

The manual recount provisions in Florida law state that, if a test recount indicates "an error in the vote tabulation which could affect the outcome of the election," the canvassing board can "[m]anually recount *all* ballots." Fla. Stat. § 102.166(5)(c) (emphasis added); *see Gore* v. *Harris*, slip op. at 45–46 (Wells, C.J., dissenting) (citing Fla. Stat. § 102.166(5)(c)). In other words, "Section 102.166(5)(c) *requires that, if there is a manual recount, all of the ballots have to be recounted.*" *Id.* at 53 (Wells, C.J., dissenting). The majority below, however, altered the manual recount provision to fit the perceived needs of

this election contest, changing the statute to allow for a partial recount of only *certain* ballots. *Id.* at 16.[2]

These changes run afoul of the grant of "plenary" power to the State Legislature in Article II, § 1, cl. 2 of the United States Constitution. *See McPherson* v. *Blacker*, 146 U.S. 1, 7 (1892). These changes further violate 3 U.S.C. § 5 because all of them were adopted *after* the November 7, 2000, election and applied retroactively. Finally, these changes unleashed an arbitrary, standardless, and fundamentally unfair process of counting ballots in violation of due process and equal protection.

B. Counting Partially Punched Ballots Without Clear, Uniform Standards Attributes Political Speech to Voters Without Their Consent and Dilutes Proper Votes by "Stuffing the Ballot Box."

In *Baker* v. *Carr*, this Court noted that "[a] citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by . . . a stuffing of the ballot box." 369 U.S. 186, 208 (1962) (citing *Ex parte Siebold*, 100 U.S. 371 (1879), and *United States* v. *Saylor*, 322 U.S. 385 (1944)). The effect of the judgment of the Supreme Court of Florida was to order the circuit court and election officials in Florida to divine the intent of individual voters based on either a discretionary majority vote of local officials or the individual subjective views of the persons handling the ballots. By requiring the circuit court to accept the untimely manual recounts and include them in the

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[2] Other changes included eviscerating the deadline for submitting amended returns following an election protest and ordering the Leon County Supervisor of Elections to count Miami-Dade County ballots.

certified election results, the Florida Supreme Court adopted a standardless procedure and "stuffed the ballot box" in violation of voters' First Amendment right to freedom of expression and Fourteenth Amendment rights to due process and equal protection.

It is well established that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms. . . . Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams* v. *Rhodes*, 393 U.S. 23, 30–31 (1968). The First Amendment protects the right of our nation's citizens not only to entertain their individual political beliefs, but also to express them. *Id.* at 30; *see also Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind."); *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n*, 475 U.S. 1, 2 (1986)("[T]he choice to speak includes within it the choice of what not to say."). When a citizen casts a vote, it is the ultimate expression of individual political speech and constitutes the culmination of the individual right to choose the representative governing body.

During this election, the overwhelming majority of Floridians who cast their votes using punch-card ballots did so in accordance with the instructions for properly casting ballots, and those votes were accurately tabulated in keeping with the principles of due process. As noted by the Secretary of State:

> In the weeks before the November 7, 2000, general election, each registered voter in Florida was provided with a sample ballot and detailed instructions on how to vote according to the method used in his or her precinct. Additionally, a copy of the instructions was placed prominently in

each voting booth. *See* Fla. Stat. § 101.46. In those districts using punch cards, the instructions explained how a voter was to select and punch out the appropriate chad on the ballot. App. at 14a. The instructions included this specific direction:

> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**

Id. When voters followed the instructions, including the removal of any loose chips left attached to their ballots, the automatic tabulation accurately tabulated the ballots. There is no contention otherwise. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices, as directed, would be affected by the manual recount at issue.

Harris Resp. to Pet. for Cert. at 15 n.12, *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. ___ (2000) (No. 00-836). Thus, the requirements for casting a correct vote were well established, had been made available to every voter prior to election day, and were followed by the overwhelming majority of voters.

Changing the rules for counting partially punched ballots after the election is fundamentally unfair. Allowing counties to count so-called "dimpled chads" and stray marks as votes constitutes an arbitrary deviation from these well-established election rules and dilutes the weight given to votes that were properly punched and counted. Changing the rules for counting partially punched ballots only in certain counties also dilutes the votes of those whose partially punched ballots are left

uncounted in their county's manual recount because their county adheres to its pre-election rules. By ordering a new standardless statewide count, the Florida Supreme Court has validated these wholly arbitrary recounts and assured that innumerable non-votes will be added to a candidate's tally.[3]

Where there is no clear standard by which to evaluate inadequately marked ballots, election officials and judges will inevitably place political speech in the mouths of voters unwilling to vote for either candidate. For example, voters may enter the voting booth and have second thoughts about their decisions and change their minds mid-vote, leaving a "dimpled chad." If election officials count those indentations as votes, they are "stuffing the ballot box" by putting words into the voters' mouths.[4] The government cannot compel voters to speak when they have chosen to remain silent. *See West Virginia* v. *Barnette*, 319 U.S. 624, 631–41 (1943).

Under the Due Process Clause of the Fourteenth Amendment, voters have the right to have their individual ballots correctly counted and reported. *Gray* v.

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[3] As noted by Judge Tjoflat, "[t]his bolsters [Petitioner's] claim of a *Roe*-type violation, which dilutes the votes of bona fide voters in violation of the First and Fourteenth Amendments." *Touchston* v. *McDermott*, No. 00-15985, slip op. at 40 (11th Cir. Dec. 6, 2000) (Tjoflat, J., joined by Birch and Dubina, JJ., dissenting). In *Roe*, there was no question as to voter intent; the contested ballots would have diluted valid votes simply because they were improperly executed. *Id.*; *Roe I*, 43 F. 3d at 581. This case is much more egregious than *Roe* because valid votes are being diluted not only by improperly executed votes, but also "by the inevitable counting of markings on ballots that were *not* intended as votes." *Touchston*, slip op. at 39 (Tjoflat, J., dissenting).

[4] *Cf. United States* v. *Saylor*, 322 U.S. at 388 (holding that electors have the right to have their vote honestly counted and not diluted by stuffing the ballot box).

Sanders, 372 U.S. 368, 380 (1963). In this race, numerous ballots were correctly punched for the bulk of the races, leaving the choice for President and Vice President unselected. This indicates that, had these voters wanted to vote for any given presidential candidate, they not only knew how to do so, they had demonstrated their ability to do so. There was no option on these ballots for "NONE OF THE ABOVE." By correctly selecting candidates in other races and leaving only a "dimpled chad" or entirely unmarked portion for the presidential race, these voters exercised their right to refrain from speaking under the First Amendment. *See Wooley*, 430 U.S. at 714. Election officials should not be allowed to speak where voters have remained silent; for, with that silence, these citizens have voiced their views on the presidential race. *See Barnette*, 319 U.S. at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.")

In the absence of a clear standard, the divination of these improperly marked ballots ultimately says more about the intent of the election officials than the intent of the voters. To affirm this arbitrary conduct, this Court would be "required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.* at 634. By impermissibly attributing this political speech to citizens who elected not to vote in a particular race, election officials effectively "stuff the ballot box" and dilute the weight of the votes of those citizens who actually voted in this race. *Cf. Ex parte Siebold*, 100 U.S. 371; *United States* v. *Saylor*, 322 U.S. 385.

This action has violated the due process rights of those citizens who elected not to vote in this race and expected

that their silence would be interpreted as it was intended — as a vote for "NONE OF THE ABOVE." *See Baker* v. *Carr*, 369 U.S. at 208; *United States* v. *Saylor*, 322 U.S. at 388 ("This case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted."); *Gray* v. *Sanders*, 372 U.S. at 380 ("The [United States Supreme] Court has consistently recognized that all qualified voters have a constitutionally protected right 'to cast their ballots and have them . . . correctly counted and reported.' ") (citations omitted). Voters who had second thoughts, or inadvertently made a stray mark, leaving only a "dimpled chad," could reasonably expect, after reading the voting instructions, that their "dimpled chad" would not be counted. Thus, by ordering the circuit court to embark on a standardless, statewide manual recount, the Florida Supreme Court not only violated the First Amendment rights of those voters who chose to remain silent, it violated the due process rights of both the voters who clearly selected a presidential candidate and those who chose to abstain from casting a vote in the presidential election.

C. By Changing the Definition of a "Valid Vote" and the Statutory Protest and Contest Periods, the Florida Supreme Court Gave an Unfair Advantage to a Campaign That Chose to "Front-Load" Its Challenges Into the Protest Period.

Under Florida law as it existed at the time of the election, a valid vote was cast, in those districts using punch cards, when the voting selection was "clearly and cleanly punched and there [were] no chips left hanging on the back of the card." Harris Resp. to Pet. for Cert. at 15 n.12, *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. ___ (2000) (No. 00-836). Based on these regulations, a candidate could reasonably expect that only those ballots that complied with these instructions would be

tabulated. Moreover, under contemporary Florida law, a candidate could reasonably forego requesting a manual recount as part of an election protest because the protest period was so short. The candidate could reasonably choose to save his request for a manual recount until an election contest, where there would be more time. This was particularly true where the contest period was originally over four times longer than the protest period and, in addition to the manual recount, afforded the candidate the opportunity to create a full evidentiary record of all alleged election improprieties or illegality. Fla. Stat. § 102.112(3) (2000). As is evident from the events of the past few weeks, a manual recount can be an arduous and time-consuming process taking longer than a week — especially in large counties. A candidate who desired such recounts would likely know this and could reasonably decide to wait and request the manual recounts as part of an election contest where there would be more time.

By altering the definition of a "valid vote" and altering the statutory protest and contest periods, the Florida Supreme Court violated due process. As previously noted, by ordering a new standardless recount, the Florida Supreme Court sanctioned wholly arbitrary recounts and validated "dimpled chads" and stray marks as constituting valid votes. Moreover, by enlarging the statutory protest period from seven days to 19 days and shortening the contest period from 29 days to 16 days, the Florida Supreme Court thwarted the reasonable expectations of the candidates and gave a fundamentally unfair advantage to a campaign that chose to "front-load" its challenges into the protest period. "Had the candidates known that Florida's statutory election system allowed the selective mining of votes through its manual recount system, they might have made use of the system to request that at least some of the 180,000 ballots

containing non-votes in the presidential race be examined . . . ." *Touchston*, slip op. at 40 (Tjoflat, J., joined by Birch and Dubina, JJ., dissenting).

These post-election changes benefited the "front-loading" campaign by lowering the standards for determining a "valid vote" and then giving it the majority of the available time for its challenges while reducing the time available to the other campaign to respond in a contest. Had the candidates known that the requirements for a "valid vote" would be lowered and the protest period would have been lengthened, campaign strategies would have taken this into account. *See Roe I*, 43 F.3d at 582; *Brown* v. *O'Brien*, 469 F.3d at 569–70. By retroactively changing the election rules, however, the Supreme Court of Florida deprived the candidates of this opportunity.

III. THE FLORIDA SUPREME COURT UNLEASHED ARBITRARY RECOUNTS THAT VIOLATE DUE PROCESS AND EQUAL PROTECTION.

Aside from the constitutional problems of post-election judicially created rules for recounts, the decision of the Supreme Court of Florida requires partial, manual recounts that are wholly arbitrary and, hence, unconstitutional. In *Moore* v. *Ogilvie*, 394 U.S. 814, 818–19 (1969), this Court held that an "arbitrary formula" for the selection of presidential electors by the State of Illinois violated the Fourteenth Amendment. Similarly, in *O'Brien* v. *Skinner*, 414 U.S. 524, 530 (1974), this Court held that "New York's election statutes, as construed by its highest court, discriminate[d] between categories of qualified voters in a way that, . . . [was] wholly arbitrary" and, therefore, violated the Fourteenth Amendment.

As Chief Justice Wells explained, "The majority returns the case to the circuit court for this partial recount of under-votes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown." Slip op. at 41 (Wells, C.J., dissenting). The Chief Justice reasoned that the Florida statute governing manual recounts "utterly fails to provide any meaningful standard." *Id.* at 51. In the light of this mandate of arbitrary recounts, Chief Justice Wells foresaw constitutional violations:

> There is no doubt that every vote should be counted where there is a "clear indication of the intent of the voter." The problem is how a county canvassing board translates that directive to these punch cards. Should a county canvassing board count or not count a "dimpled chad" where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.

Id. at 51–52.

Chief Justice Wells also explained that the arbitrary nature of the manual recounts ordered by the Supreme Court of Florida is manifold:

> The Court fails to make provision for: (1) the qualifications of those who count; (2) what standards are used in the count- are they the same standards for all ballots statewide or a continuation of the county-by-county

> constitutionally suspect standards; (3) who is to observe the count; (4) how one objects to the count; (5) who is entitled to object to the count; (6) whether a person may object to a counter; (7) the possible lack of personnel to conduct the count; (8) the fatigue of the counters; and (9) the effect of the differing intra-county standards.

Id. at 57.

Even before the Florida Supreme Court entered its latest decision, three judges of the United States Court of Appeals for the Eleventh Circuit concluded that the process for manual recounts in Florida was unconstitutional:

> Florida's statutory election scheme envisions hand recounts to be an integral part of the process, providing a check when there are "error[s] in the vote tabulation which could affect the outcome of the election." *See* Fla. Stat. Ann. § 102.166(5). The 1989 Florida legislature, however, abdicated its responsibility to prescribe meaningful guidelines for ensuring that any such manual recount would be conducted fairly, accurately, and uniformly. While Florida's legislature was unquestionably vested with the power under Article II, Section One of the United States Constitution to devise its own procedures for selecting the state's electors, it was also required to ensure that whatever process it established comported with the equal protection and due process requirements of the Fourteenth Amendment to that same Constitution. Other states, such as Indiana, have provided clear and definitive standards under which manual recounts are to be conducted. *See* Ind. Code § 3-12-1-9.5 (providing in part that chads that have been

> pierced count as valid votes, but those with indentations that are not separated from the ballot card do not). Absent similar clear and certain standards, Florida's manual recount scheme cannot pass constitutional muster.

Touchston, slip op. at 64–65 (footnote omitted) (Birch, J., joined by Tjoflat and Dubina, JJ., dissenting). When the Eleventh Circuit considered this matter, manual recounts were not under way and Governor Bush had been certified as the winner, so a majority of the Eleventh Circuit concluded that Bush had not established irreparable harm. *See Siegel v. LePore*, No. 00-15981 (11th Cir. Dec. 6, 2000). That harm is now imminent.

IV. THIS CASE ILLUSTRATES THE IMPERATIVE OF LEGISLATIVE, NOT JUDICIAL, SUPREMACY IN ESTABLISHING ELECTION RULES TO ENSURE FUNDAMENTAL FAIRNESS.

Another similarity between the *Roe* litigation and the decision of the Florida Supreme Court is the special need for deferring to the exclusive, constitutional authority of legislative bodies to establish rules for voting before an election rather than allowing courts to create rules for voting to apply retroactively in post-election disputes. In both the *Roe* litigation and this case, the state courts failed to defer to the supremacy of the legislatures with disastrous results. In each case, the legislature also had sought to prevent the judicial chicanery that later occurred. Federal relief then became necessary to fulfill the guarantees of the First and Fourteenth Amendments that state courts not change legislative rules retroactively to alter the outcome of an election.

In the *Roe* litigation, the State's pre-election rules plainly prohibited post-election intervention by the Alabama courts. *See* Ala. Code § 17-15-6 (1995) (discussed in *Roe I*, 43 F.3d at 577–78 & n.4; *Roe III*, 68 F.3d at 408–09 & n.7). In the *Roe* context of the election of the Chief Justice, Alabama law also provided that only the state legislature could hear and decide an election contest. Ala. Code §§ 17-15-50 to 17-15-63 (1995) (discussed in *Roe I*, 43 F.3d at 577).

Similarly, this case presents important issues of legislative supremacy in election matters that call into question the fundamental fairness of the decision of the Florida Supreme Court. The ultimate source of that legislative supremacy, of course, is the Constitution, which provides "Each State shall appoint, *in such manner as the Legislature thereof may direct*, a Number of Electors . . . ." U.S. Const. art. II, § 1 (emphasis added). The Constitution does not refer this matter to the entire State government but to the State Legislature alone. Likewise, the National Legislature required, more than a century ago, that any post-election controversy regarding the appointment of presidential electors be resolved "by laws enacted prior to the day fixed for the appointment of the electors." 3 U.S.C. § 5. Representative William Craig Cooper of Ohio explained, in the congressional debate on this law, that Congress should prevent state judicial mischief in the appointment of presidential electors: "How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?" 18 Cong. Rec. 47 (Dec. 8, 1886). Congress also provided that in the event of any failure to appoint electors "on the day prescribed by law, the electors may be appointed on a subsequent day *in such a manner as the legislature of*

such state may direct." 3 U.S.C. § 2 (1994) (emphasis added).

Both the Framers and Congress contemplated that the appointment of presidential electors was to be the exclusive province of state legislatures. "Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will perhaps, in most cases, of themselves determine it." The Federalist No. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961). As in *Roe*, the judicial usurpation of this state legislative authority by the Supreme Court of Florida violated the Constitution, and its fundamental unfairness must be redressed by the federal judiciary.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted,

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Dec 10, 2000

No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH and RICHARD CHENEY,

Petitioners,

v.

ALBERT GORE, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF *AMICUS CURIAE* OF THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. May the term "Legislature" as used in Article II, section 1 of the United States Constitution be construed to grant the members of a state legislature the power to provide for the selection of Presidential electors without regard to the judicially enforceable constraints and norms imposed by a state's constitution?

2. Can the good faith effort of the Supreme Court of Florida to construe and implement ambiguous and incomplete provisions of the Florida election laws in order to assure that the votes of all voters be counted in accordance with the mandate of the Florida Legislature and the Florida Constitution be deemed an improper post-election revision of the rules governing the selection of Presidential electors within the meaning of 3 U.S.C. § 5? If so, does 3 U.S.C. § 5 violate the Tenth Amendment to the United States Constitution?

3. Does the effort of the Florida Legislature and the Florida Supreme Court to discern the intent of voters in connection with so-called "undercounted" votes for President violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by introducing varying standards into the vote counting process?

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INTEREST OF *AMICUS CURIAE*

The Brennan Center for Justice at N.Y.U. School of Law is a non-partisan organization that seeks to honor the memory of Justice William J. Brennan, Jr. by seeking to protect and defend the institutions of American democracy.[1] In the context of the 2000 election, the Brennan Center has represented Republicans, most notably Senator John McCain in his successful challenge to the provisions of the New York State Election Law that denied him a place on the New York State Republican Presidential Primary ballot; Democrats, most notably members of the Missouri legislature in this Court in defense of efforts to limit the size of campaign contributions; and minor party candidates, most notably Ralph Nader in his efforts to obtain ballot status in Illinois, Idaho, and North Carolina.

This case raises critical issues concerning the integrity of the democratic process in Florida, and the role of courts in enforcing the guarantees of the equal right to vote, and the equal right to have one's vote counted that are contained in the Constitution of the State of Florida, as well as the Constitution of the United States. This brief *amicus curiae* is submitted in the hope that the Court will find it helpful in analyzing the issues before it.

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1. As required by Rule 37(6) of the Rules of the Supreme Court of the United States, *amicus* Brennan Center states that the accompanying brief was not authored in whole or in part by counsel for any of the parties. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amicus curiae* and its counsel.

STATEMENT OF THE CASE

In an effort to determine the winner of the closest Presidential election in history, the State of Florida has expended substantial resources in seeking to identify the Presidential candidate who received the plurality of the votes in the State of Florida. The two leading candidates — Vice President Gore and Governor Bush — are in a virtual tie, creating an unaccustomed need to account accurately for every ballot.

Pursuant to Florida law, the initial effort to determine the will of the electorate was carried out by a machine count of ballots pursuant to the two machine voting systems used in the state — optical scanning and punch card voting. Optical scanning machines "read" marks on the ballot, and are generally conceded to have a very low rate of failure in tabulating a voter's expressed will. Punch card voting depends upon an older technology that allows machines to search for holes in the ballot made by voters next to the name of the preferred candidate. Few could dispute that punch card technology leaves room for considerable inaccuracy in tabulating a vote, either because the hole is not large enough, because the voter's punch has not completely removed all debris, or because the ballots may be misaligned with the punch mechanism. *See Siegel v. Lepore*, No. 00-15981, 2000 WL 1781946, slip op. at 124, 127 (chart C & F) (11th Cir. 2000).

The result of the first machine count was so close that, under Florida law, a second machine count was automatically required. *See* Fla. Stat. 102.141(4) (2000). The results of the second machine count were also extraordinarily close, and triggered a high level of concern over the reliability of the

punch card machines in accurately reflecting the will of the voters. It quickly became clear that many thousands of Florida voters in punch card counties had fallen prey to confusion in seeking to vote for President, resulting in the disqualification of approximately 50,000 votes in areas where Vice President Gore appeared to command large majorities. The Florida courts, while acknowledging the unfortunate nature of such a confusion-induced failure of punch card technology, recognized that nothing could be done to restore the lost votes. *See Fladell v. Palm Beach Canvassing Bd.*, No. SC00-2373, 2000 WL 1763142 (Fla. 2000). Instead, attention centered on the substantial number of Presidential ballots in punch card counties for which no vote was registered, either because the voter elected to abstain from voting for President, or because the punch card machine failed to tabulate the vote accurately.

Using the so-called "protest" provisions of Florida election law, Vice President Gore challenged the result of the machine counts, arguing that a hand recount was necessary to determine whether the punch card machines had failed to tabulate a significant number of Gore votes. *See Bush v. Palm Beach Canvassing Bd.*, 121 S. Ct. 471 (2000). Pursuant to Florida law, Vice President Gore sought hand recounts in punch card counties with a high percentage of "blank" votes for President — Dade, Palm Beach, Broward, and Volusia. *See Gore v. Harris*, No. SC00-2431, slip op. at 28 n.16 (Fla. Dec. 8, 2000). Governor Bush, although eligible to seek hand recounts in other counties, elected not to do so.

When it became clear that hand recounts could not be completed within the time limits established by Florida law for certifying the election results, the parties turned to the

Supreme Court of Florida to clarify the apparent conflict between the time limits established by the Florida legislature for election certification, and the legislative grant of a right to seek a hand recount in settings where serious doubt exists about the accuracy of the machine tabulation. Using classic techniques of statutory construction, the Florida Supreme Court found that the conflict between the two statutory provisions should be resolved in favor of permitting a speedy completion of the hand recounts, unless the hand recounts posed a risk to the timely certification of Presidential electors. *See Palm Beach County Canvassing Bd. v. Harris*, Nos. SC00-2346, SCC00-2348, SC00-2349, 2000 WL 1725434 (Fla. Nov. 21, 2000), *vacated and remanded, sub nom. Bush v. Palm Beach County Canvassing Bd.*, 121 S. Ct. 471 (2000). In reaching its decision, the Florida Court relied upon the intense concern for the franchise embodied in the Florida Constitution as a guide to determining the will of the legislature. *See, e.g.*, 2000 WL 1725434, at *6, *12, *15.

Governor Bush appealed to this Court, arguing that the action of the Florida Supreme Court in delaying certification of the election results in order to permit completion of hand recounts: (1) violated Article II, section 1 of the United States Constitution because the Florida Supreme Court allegedly unduly "circumscribed" the power of the "legislature" to direct the appointment of Presidential electors; and (2) violated 3 U.S.C. § 5 because it constituted a post-election change in the rules governing the selection of Presidential electors. *See* Brief for Petitioner Bush at i, *Bush v. Palm Beach County Canvassing Bd.*, No. 00-836 (U.S.). This Court, unable to discern from the text of the decision of the Supreme Court of Florida whether the Florida decision was intended to "circumscribe" the power of the Florida legislature by imposing state constitutional constraints on the process of choosing

electors, or was intended merely to carry out the will of the Florida legislature by using the Florida Constitution as a guide to statutory construction, vacated the Florida decision and remanded for further proceedings. *See Bush v. Palm Beach County Canvassing Bd., supra.*

In the meantime, the Florida Secretary of State had certified Governor Bush as the winner, provisionally accepting the results of complete hand recounts in Broward and Volusia Counties which had been completed prior to the deadline set by the Florida Supreme Court, rejecting a complete hand recount in Palm Beach County that was completed two hours after the court deadline, and never receiving a partial hand recount in Dade County that had been carried out prior to a decision by local officials to suspend the hand recount. Invoking an entirely different set of Florida statutory provisions providing for judicial review of contested elections, Vice President Gore "protested" the certification of Governor Bush as the winner of the Florida Presidential election, arguing that it violated Florida law to ignore the results of the hand recounts in Broward, Palm Beach, and Dade Counties, and that election officials in Dade County had violated Florida law in suspending the hand recount in the face of turbulent protests. *See Gore v. Harris*, No. SC00-2431, slip op. at 2-3 (Fla. Dec. 8, 2000).

The Supreme Court of Florida ruled that Florida statutes authorized the immediate hand recount of all "undercounted" Presidential ballots throughout the state in order to assure that the election actually reflects the will of the voters and not the vagaries of flawed technology. *See id.*, slip op. at 39-40. This appeal followed, in which Petitioner argues that the Florida Supreme Court has violated Article II, section 1 by using the Florida Constitution to

"circumscribe" the untrammeled power of the Florida legislature to control the selection of Presidential electors. *See* Emergency Application of Bush at 23-28, *Bush v. Gore*, No. 00949 (U.S.). Petitioner argues, as well, that providing for a judicially-mandated hand recount alters the rules governing the selection of electors in violation of 3 U.S.C. § 5, and that conducting such a hand recount pursuant to varying standards of how to determine the intent of the voter introduces an unconstitutional degree of non-uniformity into the process. *See id.* at 29-34.

In response to Governor Bush's appeal, this Court voted 5-4 to stay the hand recounts pending oral argument on Monday, December 11, 2000.[2] *See Bush v. Gore*, No. 00-949 (U.S. Dec. 9, 2000).

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2. The grant of the stay, which renders it virtually impossible to complete the hand recounts by December 12, and, therefore, virtually impossible to know whether the machine tabulations were accurate in time to correct the errors, appears to stand the principle of irreparable injury on its head. Allowing the recounts to go forward could not have caused irreparable injury, since the Court would be free to reject the results. However, barring the hand recounts pending argument makes it virtually impossible to complete them, even if the Court finds the hand recounts to have been lawful. Justice Scalia's suggestion that stopping the hand recounts was needed to shield the nation from knowledge of what a hand recount would reveal is an uncharacteristic exercise in judicial paternalism. It is, moreover, futile, since the ballots will undoubtedly be counted by news organizations and academics — too late to affect the outcome of the election, but in time to call the legitimacy of the Presidency into question.

ARGUMENT

I.

THE TERM "LEGISLATURE" AS USED IN ARTICLE II, SECTION 1 OF THE UNITED STATES CONSTITUTION CANNOT BE READ TO EMPOWER THE MEMBERS OF A STATE LEGISLATURE TO IGNORE THE CONSTRAINTS AND NORMS IMPOSED UPON THE LEGISLATURE BY THE STATE CONSTITUTION.

In its *per curiam* decision vacating the decision of the Florida Supreme Court, it appeared that certain members of this Court were reading the term "Legislature" as it is used in Article II, section 1 as providing an unrestricted grant of power to the members of a state legislature to ignore constraints and norms imposed on a state legislature by the state's constitution. Indeed, the only principled basis for the grant of a stay preventing the State of Florida from completing the hand recounts ordered by the Florida Supreme Court would be a belief that the Supreme Court of Florida was in violation of Article II, section 1 when it sought to invoke the provisions of the Florida Constitution to resolve ambiguities in the Florida statutory scheme, and to fill lacunae in the remedial scheme.

To the extent that the Court's reasoning is based upon such a deracinated reading of the term "Legislature," *amicus* earnestly urges the Court to reconsider a reading of Article II, section 1 that is inconsistent with the rule of law, and that cannot be viewed as a principled application of its recent jurisprudence. Reasonable people may disagree with the decision of the Florida Supreme Court about the meaning

of Florida law. Moreover, it is impossible to ignore the importance of the ruling in determining the next President. But neither the stakes involved, nor the closeness of the legal issues of state law justify the use of Article II, section 1 to "federalize" the Florida Legislature in an effort to freeze the Florida Supreme Court out of the process of construing Florida law.

A. The Term "Legislature" When Used In Article II, Section 1 Of The Constitution Must Mean A Political Institution Functioning In Accordance With The Judicially Enforceable State Constitutional Powers And Constraints That Give It Life.

There is a suggestion by certain members of this Court in both the opinion granting the stay and the *per curiam* opinion vacating the first decision of the Supreme Court of Florida that a state "legislature" empowered by Article II, section 1 to "appoint" electors is licensed to act inconsistently with the state's constitution, and that any effort by the State's highest tribunal to use the State's constitution as a guide to construing legislative will concerning the method of selecting electors, or as a means of filling legislative gaps concerning remedies, is a violation of the Federal Constitution. To begin with, the Constitution does not require states even to create legislatures. But, in any event, a political entity authorized to act inconsistently with the very state constitution that created it is simply not the state legislature. Rather it is a group of individuals purporting to exercise legislative power, but refusing to adhere to the basic norms that govern legislative conduct in the relevant state.

In his 1964 Holmes Lecture, Henry Hart began by asking the audience what a "single" would be like if there were no

baseball. *See* Burt Neuborne, *Tales of Popular Sovereignty Making the Law Safe for Democracy: A Review of 'the Law of Democracy Etc.'*, 97 Mich. L. Rev. 1578 (1999) (describing Hart's 1964 Holmes lecture). Professor Hart was seeking to remind us that a legal institution may not be torn from its context and treated as a freestanding phenomenon unencumbered by the constraints imposed by the structural matrix in which it exists. Professor Hart's question resonates through this appeal. Paraphrasing Professor Hart, can an American state legislature be torn from the constitutional matrix that both created the legislature and constrains its powers? State legislatures, like baseball singles, cannot be ripped from their institutional matrix and treated like freestanding phenomena. The very idea of an American "legislature" carries with it the constitutional constraints and norms that establish the legislature, define its powers, and limit the scope of its lawful operations.

Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it has been the hallmark of the American experiment in democracy and the rule of law to recognize that legislatures swim in a sea of constitutional norms that both empower and restrict legislative action. Indeed, in recent years, a narrow majority of this Court has repeatedly rebuffed efforts by Congress to expand its operations beyond the limits of the narrow majority's reading of Congress's proper constitutional powers. *See, e.g., United States v. Morrison*, 120 S. Ct. 1740 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995). It is inconceivable that the Founders, having literally invented the idea of a legislature constrained by judicially enforceable constitutional norms, would have used Article II, Section 1 as a vehicle to create a state legislative body empowered to disregard the very state constitution that established it.

Nothing in *McPherson v. Blacker*, 146 U.S. 1 (1892), suggests otherwise. In rejecting a challenge to a state legislative decision to elect electors by congressional districts instead of at-large, Chief Justice Fuller stressed that the judgment about the means of choosing Presidential electors was delegated by Article II, section 1 to the legislatures of the several states, and that no particular means of selection was mandated by the Federal Constitution. But the *McPherson* Court never suggested that the state legislature was free to ignore the state constitution in exercising its Article II responsibilities. Indeed, Chief Justice Fuller was careful to point out that state legislative action under Article II, section 1 must be subject to state constitutional limits. In describing the nature of the state legislature that was to exercise Article II power, Chief Justice Fuller noted:

> The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority, *except as limited by the constitution of the state*, and the sovereignty of the people is exercised through their representatives in the legislature, *unless by the fundamental law power is elsewhere reposed.*

146 U.S. at 24-25 (emphasis added).

B. Even If The Original Text Of Article II, Section 1 Could Be Read As Authorizing State Legislative Action In Violation Of A State's Constitution, Such A Reading Cannot Survive The Adoption Of The Tenth Amendment.

As *amicus* has argued, it is inconceivable that the Founders intended to free state legislatures from state constitutional constraints in carrying out the responsibilities vested in them by Article II, section 1. Even if the original text of Article II could be read as immunizing state "legislatures" from state constitutional constraints when they regulate the selection of Presidential electors, such a reading cannot survive the adoption of the Bill of Rights, with its explicit protection of state sovereignty in the Tenth Amendment. It is not so much that the Tenth Amendment would overrule Article II, Section 1, but the principles of state sovereignty embodied in the Tenth Amendment inform us as to how Article II, section 1 should be construed.

As a narrow majority of this Court has held in recent years, the Tenth Amendment forbids the federal government from "commandeering" an agency of the state government to perform a federal function in ways that interfere with the sovereign prerogatives of the state. *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). It would be a strange Tenth Amendment that forbade Congress from "commandeering" state sheriffs to conduct background checks on hand gun purchasers, but permitted a state's legislature to be severed from its state constitutional moorings in carrying out Article II, section 1 responsibilities.

It is, of course, true that cases like *Printz* and *New York v. United States* involve efforts by Congress to impose duties on state agencies under general grants of constitutional authority, while this case involves the language of the Constitution itself. But this Court has repeatedly recognized that language in an earlier provision of the Constitution must be read in light of subsequent provisions that may alter or even overrule the meaning of prior provisions. For example, a narrow majority of this Court has held that the plenary grant of power to Congress under the original Commerce Clause was limited by the enactment of the Eleventh Amendment, even in the absence of a literal collision between the two provisions of the Constitution. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The Court has also held that the limits imposed by the Eleventh Amendment may be overridden by Congress when it acts pursuant to the later-enacted Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Most dramatically, in *Richardson v. Ramirez*, 418 U.S. 24 (1974), this Court construed the provisions of section 2 of the Fourteenth Amendment to limit the reach of section 1 of the Fourteenth Amendment in order to uphold a state's disenfranchisement of ex-felons. Just as the Eleventh Amendment altered the Commerce Clause, the Fourteenth Amendment altered the Eleventh, and section 2 of the Fourteenth Amendment altered section 1, so the adoption of the Tenth Amendment ended any possibility of reading Article II, section 1 as authorizing state legislatures to act in violation of state constitutions when they carry out their Article II, section 1 responsibilities.

Thus, when the Florida Supreme Court referred to the Florida Constitution in construing ambiguities in the Florida statutory scheme and in filling remedial gaps in that scheme, the Court was not acting in violation of Article II, section 1

of the United States Constitution. By using the Florida Constitution to help resolve state statutory ambiguities and to fill state remedial lacunae, the Florida Supreme Court was acting precisely as the Founders hoped, and well within the sovereign prerogative of the State of Florida.[3]

II.

IF 3 U.S.C. § 5 IS READ TO PREVENT THE SUPREME COURT OF FLORIDA FROM CONSTRUING FLORIDA STATUTORY LAW TO PERMIT A HAND RECOUNT OF PRESIDENTIAL BALLOTS TO ASSURE THAT ALL VOTES ARE COUNTED, IT WOULD VIOLATE THE TENTH AMENDMENT.

Petitioner argues that Florida's Supreme Court violated 3 U.S.C. § 5 by engaging in a post-election alteration of the rules governing the selection of Presidential electors. Unlike the Bush challenge to the Florida Supreme Court's initial ruling extending the certification deadline to enable the completion of hand recounts, there is no suggestion that the Florida Court has ignored a Florida legislative mandate. Rather, the argument is that the decision to order hand recounts of all undercounted Presidential ballots throughout the state in accordance with Florida statutes permitting such recounts under certain circumstances is an exercise in judicial remediation that goes beyond the legislature's established procedures.

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3. An extreme reading of Article II, section 1 ultimately calls into question the entire federal statutory scheme regulating the choice of electors. If only the state legislature may direct the manner of appointing electors, then from where does Congress get the power to limit that authority with specific procedures referring to the state judiciary and executive as in 3 U.S.C. § 5 and 3 U.S.C. § 15?

To the extent that this appeal is based on an argument that the Florida Supreme Court has made a mistake concerning the meaning of Florida law, it has no place in this Court. The last word on the meaning of Florida law must be spoken by the Supreme Court of Florida, even in cases involving the selection of Presidential electors. To the extent that Petitioner is arguing that the Florida Supreme Court violated federal law by altering the rules governing the selection of Presidential electors after the election, the objection is subject to three responses. First, the Florida Supreme Court was scrupulous in basing its ruling on existing Florida statutory law. When, as here, a court construes a statute, it cannot be deemed to be making new law. Rather, the court is applying pre-existing law. Otherwise, courts could never be asked to play a role in resolving election contests involving Presidential electors, since the loser will always claim that the adverse ruling fails to carry out the will of the legislature, and, thus, unfairly changes the rules. Thus, arguing that the Florida Court got its own law wrong is simply not a basis for invoking 3 U.S.C. § 5. Second, it is highly doubtful that 3 U.S.C. § 5 is intended to be judicially enforceable. Rather, it is merely a "safe harbor" rule governing Congressional challenges to Presidential electors. Finally, 3 U.S.C. § 5 cannot be read to permit this Court to sit in superintendence over the Florida Court's construction of Florida law without violating the Tenth Amendment.

Petitioner argues that 3 U.S.C. § 5 turns this Court into the Supreme Court of Florida in any case involving the selection of Presidential electors. If the Florida Supreme Court utilizes a theory of statutory construction, or an approach to remedies that a narrow majority of this Court believes is wrong, Petitioners' reading of the federal statute authorizes this Court to substitute its views about how to

read Florida statutes for the views of the Florida Supreme Court. Similarly, under Petitioners' reading of the federal statute, if this Court does not believe that judicially ordered remedies are warranted under its reading of Florida law, this Court may simply displace the reading of the Supreme Court of Florida. At bottom, Petitioners' position is that, in cases affecting the selection of Presidential electors, the Supreme Court of Florida is free to interpret Florida law, as long as a majority of this Court agrees with the outcome. Such a construction of 3 U.S.C. § 5 cannot pass muster under the Tenth Amendment.

Congress lacks power to place a state Supreme Court under the tutelage of this Court in connection with the decision of state law claims, first, because Congress must respect the essential sovereignty of state decisional processes, *see New York v. United States*, *supra*, and, second, because Congress may not commandeer a state court system to help it choose Presidential electors. *See Printz v. United States, supra*. If Congress lacks power under the Tenth Amendment to impose age restrictions on a state judiciary, *see Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991), surely it lacks the power to impose the views of a majority of the Supreme Court on a state Supreme Court seeking to construe its own state laws.

III.

THE RECOUNT PROCESS SANCTIONED BY FLORIDA STATUTE AND EXECUTED BY THE FLORIDA SUPREME COURT PREVENTS A VIOLATION OF THE EQUAL PROTECTION CLAUSE BY REMEDYING THE DISPARITIES THAT RESULT FROM AN ELECTORAL SCHEME THAT PRODUCES WIDESPREAD INTERCOUNTY VARIATION IN THE MECHANICS OF VOTING.

Petitioners' Equal Protection claim emphasizes disparities created by a counting regime that grants discretion to local officials to discern the "intent of the voter" from the range of potential ways of expressing such votes with markings on ballots. If different observers could look at similar ballots and arrive at different conclusions as to voter intent, they argue, the counting regime must fall prey to the Fourteenth Amendment. In order to make such an argument, Petitioners ignore completely the Equal Protection violation that would occur if differently situated counties were treated the same and the need for county-based discretion in discerning voter intent to address Florida's patchwork quilt of an electoral system. Were it to become law, Petitioners' argument would also call into question the election results themselves in Florida and any other states that decentralize authority to conduct elections.

First, the intercounty variation in voting mechanics requires that different standards for "intent of the voter" be used in order to *avoid* a violation of the Equal Protection Clause. By operating a decentralized electoral system, the Florida Legislature and the Florida Supreme Court that implemented its statutory scheme could not then mandate a

one-size-fits-all method of recounting that treated optical scanned ballots the same as punch-card ballots or treated counties using different types of punch-card voting mechanisms, such as the Votomatic and Pollstar machines, as if they were the same. To do so would guarantee even greater region-based inaccuracies in vote-counting. As Respondents and others have emphasized repeatedly in the litigation surrounding the 2000 presidential election, *see, e.g.*, *Siegel v. Lepore*, No. 00-15981, 2000 WL 1781946 (11th Cir. 2000), the cause of the problems that the petition for a manual recount seeks to remedy — namely, variation by county of the probability that a vote was registered as a nonvote — results from the different types of ballots and machinery used in each of Florida's counties.

This case is thus quite similar to other election law cases where this Court has held that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971); *see also Buckley v. Valeo*, 424 U.S. 1, 70-75 (1976) (suggesting that minor political parties must be treated differently from major parties under campaign finance disclosure laws given the heightened possibility of intimidation and privacy violations of minor party members); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 95-102 (1982) (applying *Buckley*'s rationale to law regulating campaign disbursements). That Florida's counties are not similarly situated when it comes to the probability of a vote registering as a nonvote cannot be disputed; it is the *raison d'etre* of the contest proceeding. Were the Florida Legislature and the Florida Supreme Court that interprets its commands to fail to fashion a recount process that was sensitive to such disparities, they would leave the intercounty variations at the stage of voting mechanics unremedied and

absolutely guarantee that voters in some counties, but not others, would have their votes more accurately tabulated. *Cf. Reynolds v. Sims*, 377 U.S. 533, 557, 566 (1964) (emphasizing that the right to vote entails the right to have one's vote counted equally with others'). Allowing local officials to tailor recount procedures to meet technical, county-specific challenges is, indeed, the only way that Florida can reconcile its decentralized electoral scheme with the demand of equal treatment the Fourteenth Amendment requires. A state that allows votes to be erroneously counted as nonvotes in some counties based on the combined arbitrariness of voting machinery and the absence of compensatory administrative and judicial remedies violates Equal Protection and the First Amendment rights of voters to have their expressed preferences on the ballot "heard" through the official tally. *Cf. Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983).

As a practical matter, recounting standards must adapt to exigent circumstances. When a statewide recount is ordered to be completed in a span of days, only the local officials and canvassing boards can possibly know how the "intent of the voter" might manifest itself (and thus be ascertained) on a given ballot in a particular election in a given jurisdiction. A more specific decree from the Florida Supreme Court not only would have risked the charge of "legislating" in alleged contravention of 3 U.S.C. § 5, but could invariably cause greater difficulty in execution because such a standard would be insensitive to differences of the ballot equipment used. The decentralization of authority in the conduct of a recount maps perfectly onto Florida's statutory scheme, which delegates all important decisions as to ballot creation, voting mechanics, and tallying of votes to local canvassing boards.

Were it upheld by this Court, petitioners' argument threatens to undermine almost any recount procedure used for statewide office in Florida or throughout the country. Recount procedures are needed most when idiosyncracies in ballot design and voting mechanics lead to geographically correlated errors in the initial count. Only through the process of recounting can the election official vested with the proper authority discover precisely the nature of the error committed that may have caused an erroneous tabulation in the original count. The recounting process represents, in part, a process of discovery why the "intent of the voter" may not have been accurately expressed through the ballot machinery designed to capture it. Petitioners would prefer that we not discover the source of such biases in electoral machinery and counting processes until after the election when an intensive reexamination of the actual ballots will have zero electoral impact.

The inevitable conclusion that follows from Petitioners' Equal Protection argument is not that this Court should halt the recounts, but rather that the Court should throw out the results of this election themselves because a different election effectively took place in different Florida counties. With that unacceptable outcome taken off the table, local discretion in judging represents the only way to approach fairness in the tabulation of different ballots that are products of different voting mechanisms. A generalized grant of authority to focus on the intent of the voter may be an imperfect remedy for the spotty problems caused by the State's delegation of broad electoral authority to local officials, but it is the only way to move closer to guaranteeing that each Floridian's vote is counted and voice is heard.

CONCLUSION

There is a terrible irony in this appeal. This Court has spent the last 50 years seeking to remove obstacles to voting. In case after case, this Court has championed the equal right to vote — and the equal right to have one's vote counted. Today, in this Court's climactic confrontation with democracy, instead of acting as the nation's ultimate guarantor of democracy, a narrow majority of this Court appears poised to prevent Florida officials from counting thousands of uncounted Presidential ballots on which the 2000 Presidential election may turn.

Thousands of Florida voters stand on the threshold of disenfranchisement because of mechanical error in the tabulation of punch card ballots by outdated voting machines that all concede have an unacceptably high margin of error. Florida law — as does Texas law — provides the means to prevent disenfranchisement by authorizing judicially supervised hand recounts of the, until now, "undercounted" ballots. The Supreme Court of Florida — the ultimate authority on Florida law — has spoken, and has directed that a judicially supervised hand recount take place immediately pursuant to flexible standards designed to identify the will of the voter in the different settings caused by the use of different types of voting machines throughout the State. The recount has begun in an orderly manner and under careful judicial supervision, with the prospect that, whoever wins, the nation will be reassured that the 2000 Presidential election was decided in the voting booth; not in a political back room. For this Court, at this point, to intervene to prevent democracy from working is, with respect, a compromise of the democratic ideals in defense of which this Court has struggled for the past half century.

For the above-stated reasons, this Court should affirm the Florida Supreme Court's opinion.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GEORGE W. BUSH and RICHARD CHENEY,

Petitioners,

v.

ALBERT GORE, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF THE FLORIDA HOUSE OF REPRESENTATIVES AND FLORIDA SENATE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY AND SEEKING REVERSAL

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court erred in establishing new standards for resolving presidential election contests that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

2. Whether the Florida Supreme Court erred in establishing post-election judicially created standards that threaten to overturn the certified results of the election for President in the State of Florida and that fail to comply with the requirements of 3 U.S.C. § 5, which gives conclusive effect to state court determinations only if those determinations are made "pursuant to" "laws enacted prior to" election day.

3. Whether the use of arbitrary, standardless and selective manual recounts to determine the results of a presidential election, including post-election judicially created selective and capricious recount procedures, that vary both across counties and within counties in the State of Florida violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

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INTEREST OF THE *AMICI CURIAE*[1]

The Florida Legislature[2] is, as this Court recognized in its prior opinion related to this matter, the entity that has plenary power over — and ultimate responsibility for — directing the manner in which Electors are appointed to represent Florida in the Electoral College. This case implicates the Florida Legislature's vital interest in having this election conducted in a manner that is orderly, fair, constitutional, and in conformity with the Legislature's directions. More, it implicates the constitutional duty of the Florida Legislature to assure that Florida "shall" be represented in the Electoral College and have its electoral votes deemed binding when counted by Congress. U.S. CONST. ART. II, § 1, ¶ 2; 3 U.S.C. § 5.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article II of the U.S. Constitution assigns State Legislatures the responsibility for directing the manner for appointing Presidential electors. The Florida Legislature has discharged that responsibility by enacting a detailed code for the selection of Florida's electors. As we explain in detail

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1. Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The Florida Legislature has secured the consent of all parties to the filing of a brief as *amicus curiae* and those consents are being lodged with the Clerk of the Court.

2. We use the term "Florida Legislature" to refer to both the Florida Senate and the Florida House of Representatives.

in this brief, the Florida Supreme Court's decision not only changes, but engages in wholesale re-writing, of the Legislature's directions. At the heart of its decision is the Florida Supreme Court's premise that an interpretive manual count is more accurate than a mechanical count and outweighs any need for finality and meeting deadlines — both of which are contrary to the Legislature's premise. If the decision below is allowed to stand, the Electors will have been chosen not "in such Manner as the Legislature . . . may direct," U.S. CONST. ART. II, § 1, but in a manner newly conceived and promulgated for this occasion by four justices of the Florida Supreme Court.

This anomalous ruling not only displaces the authority of the Florida Legislature but places at risk the participation of the Florida voters in the election of the next President because Congress plainly may deem it a change of law that makes the safe harbor of 3 U.S.C. § 5 unavailable. Even without that risk, the manual recount decreed by the court below cannot possibly be finally determined by the deadline of midnight December 11 set out in 3 U.S.C. § 5. Whether or not the chaotic, inconsistent, and standardless manual recounts required by the court's order could be completed by the deadline, the ensuing legal challenges certainly could not. Nor, as Chief Justice Wells' dissent pointed out, would such a dubious and poorly monitored process secure a more accurate determination of the will of the people. Indeed, the very irregularity of such a process might itself lead the Congress of the United States to question whether the votes of such Electors have been so "regularly given," 3 U.S.C. § 15, and thus may put those votes in question even if contests could have been resolved in a timely manner.

The decision below also disregards the mandate of this Court delivered only one week ago in *Bush v. Palm Beach County Canvassing Board*, No. 00-836 (Dec. 4, 2000), vacating the Florida Supreme Court's earlier decision and judgment in that case. One example of that disregard is the remarkable and unjustified order requiring the inclusion of several hundred votes in Palm Beach and Miami-Dade counties added in a manual recount that had proceeded past the Secretary's statutorily mandated deadline of November 14. In giving this order, the court below gave effect to a judgment and decree that this Court had vacated. Nor is it even plausible to argue, as the Florida court did, that these votes were being added because after all they had been counted by the county canvassers during that first questionably extended recount period. That recount, which had taken place during an extension which this Court had vacated and therefore nullified, was conducted under the rules governing *protests* and not the more stringent rules governing *contests*. Election protests, under which those votes were added, are conducted by the canvassing boards alone. But the procedures which the court below was supposed to be adjudicating were election contests, which are carried out by a judge, after hearing evidence and argument in open court. Those hundreds of votes added by the order of the court had never been subjected to such testing.

Finally, the decision below puts the State of Florida in violation of the United States Constitution, posing yet another risk to Florida's representation in the Electoral College. The right to vote and the right to have one's vote given equal effect are fundamental rights. A State may not design its system for selecting presidential Electors in a way that burdens or distributes that right unequally. The scheme the court below has put in place for counting the votes for

President is so replete with arbitrary and unjustifiable distinctions that it violates Equal Protection. Any designation of electors in this way might thus subsequently be either constitutionally invalidated by the courts or rejected by Congress when it counts the electoral votes.

In our brief as *amici curiae* in *Bush*, *supra*, the Florida Legislature argued that this Court should decide that the ultimate forum for resolving the disputes arising out of this extremely close and troubled election is in the political branches — the Florida Legislature and U.S. Congress — whose members will have to pay a swift and certain political price for an unfair and unwise decision. So that suggestion not be misunderstood, we also stated (and reiterate today) that the Florida Legislature will faithfully comply with this Court's resolution of these problems and with any decision it makes about which entity has authority to redress them. But whether this Court decides that the ultimate forum for correction lies in this Court or in the political branches, the decision of the Florida Supreme Court must be corrected as quickly as possible.

ARGUMENT

I. THE FLORIDA SUPREME COURT HAS DISTORTED AND DISREGARDED THE LEGISLATIVE SCHEME FOR PRESIDENTIAL ELECTIONS IN VIOLATION OF ARTICLE II.

A Presidential elector can constitutionally be appointed only "in such Manner as the [State] Legislature thereof may direct." U.S. CONST. ART. II, § 1, ¶ 2. If an elector is appointed in some manner other than that directed by the State Legislature, that appointment is unconstitutional.

This constitutional clause confers "plenary power to the state legislatures in the matter of the appointment of electors." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). Indeed, as this Court recognized, in "the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under ART. II, § 1, cl. 2, of the United States Constitution." *Bush, supra*, Op. at 4. Thus, this direct grant of authority " 'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power.' " *Bush*, *supra*, at 5 (quoting *McPherson*, 146 U.S. at 25).

State courts may not invoke even the state constitution to circumscribe this state legislative power. *Bush*, *supra*, at 5, 7.[3] But to say this is not at all to authorize state courts to circumscribe the legislative power based on *non*-constitutional judicial views about the best manner of choosing electors. To the contrary, state courts have even less grounds to deviate from the state legislature's directions when they do not even have a purported basis in the state constitution. Indeed, of all the possibilities that the Founders considered when they decided to whom to give the power to appoint Presidential electors, the one possibility that was universally rejected by the Founders was to allow the manner

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3. *See McPherson*, 146 U.S. at 34-35 ("This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions . . . . Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.") ((quoting favorably Senate Rep. No. 395, 1st Sess., 43d Cong. (1874)).

of such appointments to be controlled by state courts. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 110 (Max Farrand ed. 1966) (James Madison: "The State Judiciarys had not & he presumed wd. not be proposed as a proper source of appointment" of the Presidential electors).

A. The Legislative Directions on the Manner of Conducting Elections.

Before this election, the Florida Legislature provided a detailed and orderly scheme for the resolution of election protests and contests. Under those legislative directions, all machine ballots must be counted by machines that use a uniform standard. Manual recounts are permitted only in limited cases involving defective machines or ballots, are subject to strict limitations on how they may be conducted, and when legally denied cannot be required by merely bringing a contest action.

1. *Manual Recounts Are Rarely Permitted.*

The legislative directions provide that manual recounts are permitted only if particular ballots were damaged or defective, or if a particular county's machines were defective in a way that made them tally votes incorrectly, and even then only if those defects could not otherwise be corrected. *See* FLA. STAT. § 101.5614(5); FLA. STAT. § 102.166(5). The Legislature nowhere authorized wholesale manual recounts based on the dubious empirical premise that manual recounts can "interpret" ballots more accurately than well-functioning machines. To the contrary, permitting manual recounts on that basis is contrary to:

(a) The statutory text, which allows manual recounts only for otherwise uncorrectable "error in vote tabulation,"

FLA. STAT. § 102.166(5), not for a claim that even well-functioning machines err in "ballot interpretation." Not only does the term "tabulation" indicate a merely ministerial tally, but the term "vote tabulation" indicates that the tally was meant to tabulate already recognized votes, not to determine whether the ballot rendered a vote at all. Likewise, FLA. STAT. § 102.166(5)(a) & (b) clearly indicate that the Legislature thought the type of problem justifying a manual recount would normally be correctable by fixing the machines or software. These provisions would not make sense if the Legislature thought the problem justifying correction was that even well-functioning machines count less well than humans.

(b) The statutory structure, which allows manual recounts only on a county-specific basis. *See* FLA. STAT. § 102.166. The county-specific nature of the manual recount would not make any sense if the gravamen of the complaint were that even well-functioning machines miscount votes, since that complaint applies statewide. But this county-specific legislative direction does make sense if manual recount authorization is limited to errors in counting made by a particular county's machines. Similarly, the fact that the statute requires a manual recount of "all ballots" in the county, FLA. STAT. § 102.166(5)(c), makes sense if the gravamen of the complaint is a problem with the ability of that county's machines to count any ballot, rather than an interpretive problem limited to so-called "undervotes."

(c) The statutory deadline, which requires that manual recounts be finished within seven days of the election. *See* FLA. STAT. § 102.166; FLA. STAT. §§ 102.111-112. This legislatively imposed deadline makes perfect sense if the statute is limited to correcting defective machine counting.

Such problems arise seldom, and normally can be corrected by fixing the machines or software. Moreover, even when a manual recount is required, a ministerial manual recount (as opposed to an elaborate "interpretive" manual recount) can easily be done within a seven-day period by hiring additional counting teams. Indeed, the Florida Legislature has expressly directed that, to meet the deadline: "The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots." *See* FLA. STAT. § 102.166(7)(a). Because the manual recount is meant to be ministerial rather than interpretive, adding counting teams in larger counties avoids the bottleneck problem that results when interpretive decisions must be made by a three-person canvassing board for each county.

(d) The statutory purpose, which the face of the statute plainly indicates is to use manual recounts only as a last resort. If manual recounts could be justified on the ground that they were more accurate than machine recounts at interpreting ballots, then it would follow that manual recounts should always be done in **every** close election. But this would make a manual recount the first resort rather than the last. Further, it would be inconsistent with the fact that the Legislature specified that the statutory remedy for a close election was a machine recount, not a manual recount. *See* FLA. STAT. § 102.141(4). The Florida Legislature, in determining the manner of conducting Presidential elections, was surely free to adopt the premise that interpretations by well-functioning machines (while not perfect) are more accurate than "interpretive" manual recounts, which are susceptible to problems of fatigue, human error, unintended ballot alteration, inconsistency across counters and counties, conscious or unconscious bias, and fraud or other mischief.

(e) The opinion of the Secretary of State, whom the Legislature directed would (rather than the courts) be in charge of issuing binding opinions interpreting these provisions for county boards, and assuring uniformity among them.[4] She opined that manual recounts were not available when voter error produced partially perforated or indented chads that were not registered as votes by non-defective machines.

(f) Prior practice before this election, which was not to do a manual recount because of a claim that a county's machines were failing to count partially perforated or indented chads. *See* Transcript of Oral Arg. in *Bush*, *supra*, at 39-40 (concession of Florida Attorney General that no county had previously done so). For example, in *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992), the board recognized that "voter errors in the piercing of computer ballot cards created loose or hanging paper chads." But the board declined to do a manual recount even though two machine counts indicated a margin of 3-5 votes. "Such voter errors, the board explained, are caused by hesitant piercing, no piercing, or intentional or unintentional multiple piercing of computer ballot cards, creating what are referred to as overvotes and undervotes. The board *thereupon* denied appellee's request for a recount." *Id.* (emphasis added). Thus, before this election, the fact that

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4. FLA. STAT. § 106.23(2) ("The Division of Elections shall provide advisory opinions when requested . . . . The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought"); FLA. STAT. § 97.012 ("The Secretary of State is the chief election officer of the state, and it is his or her responsibility to: (1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.")

a request for a manual recount was based on incompletely perforated chads was considered not just insufficient, but an affirmative reason to reject a manual recount because the request was based on voter error rather than on machine or ballot defects.

2. *Manual Recounts Must Meet Strict Conditions.*

To the extent manual recounts are permitted under this statutory scheme, their conduct is subject to five conditions:

(a) The manual recount must include all ballots affected by the relevant defect. If a manual recount is done, the Legislature directed that it must count "all ballots" in the county having machine problems, FLA. STAT. § 102.166(5)(c), or if the problem is defective or damaged ballots, then "all such ballots" must be manually recounted, FLA. STAT. § 101.5614(5). Partial manual recounts were nowhere authorized by the Legislature.

(b) Any manual recount cannot count dimpled or pregnant chads. If a manual recount is done, it should not count a ballot as a vote unless the ballot left a "clear indication of the intent of the voter as determined by the canvassing board." FLA. STAT. § 101.5614(5). *See also* FLA. STAT. § 102.166(7)(b). This was previously determined by the only canvassing board to address the issue before this election, Palm Beach County, as meaning that chads could only be counted as votes if at least two corners were detatched, and not if the chad was merely dimpled or pregnant. *See* Petitioner Exh. J. Prior to this election, no Florida county board had ever counted a dimpled or pregnant ballot as a vote.

(c) Any manual recount must be completed in accord with standards for counting chads that are uniform across the counties. The Legislature has directed: "The Department of State shall adopt rules prescribing standards for ballots used in electronic or electromechanical voting systems. Such standards shall ensure that *ballots are counted in a uniform and consistent manner* and shall include, without limitation, standards for the . . . Scoring of ballots." FLA STAT. § 101.5609(8) (emphasis added). *See also* FLA. STAT. § 97.012 (the Secretary of State shall "Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.")

(d) The results of any manual recount completed more than seven days after the election are not legal votes. The Legislature directed that any votes added by manual recounts after the seven-day deadline are not considered legal votes that must be counted, but to the contrary are votes that "shall be ignored." FLA. STAT. § 102.111.[5]

(e) County boards have discretion not to do manual recounts. See FLA. STAT. § 102.166(4)(c) ("The county canvassing board may authorize a manual recount."); *Hogan*, 607 So. 2d at 510 ("The statutes clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the canvassing board.") A county thus need not proceed if it cannot complete a manual recount of all the ballots under the correct standards by the statutory deadline.

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5. Pursuant to a consent decree with the federal government, Florida law also allows for the later receipt of military and other overseas ballots.

3. *Contest Procedures Do Not Expand the Limits on Manual Recounts.*

The Legislature also authorized a contest procedure. But the legislative directions on the manner of conducting contests nowhere suggest that the contest procedure was intended to overturn the statutory scheme and create an automatic right to manual recounts in every close election. That would have been inconsistent with the statutory preference for machine recounts. Nor would there have been any reason to make the contest right to manual recounts broader than the protest right to manual recounts. That would saddle courts with manual recounts that county boards could have done, and would put courts in the odd position of ruling that it was illegal for the county boards or elections commission to deny manual recounts even though other statutes authorized or required the board or commission to do so.

To the contrary, what the contest statute provides, in the key section stressed by the Florida Supreme Court, is that one ground for a contest is: "Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." FLA. STAT. § 102.168(3)(c). If a well-functioning machine interprets a ballot as not having made a vote, then that is the rejection (or counting) of a legal *non-vote*, not the rejection of a legal vote, for legally the ballot has not registered a vote in the manner directed by the Legislature. *See supra.* Likewise, if a county properly exercises its discretion not to do a manual recount, then any ballot that is counted as a non-vote by a machine is the rejection (or counting) of a legal non-vote, not the illegal rejection of a legal vote. Thus, Florida law before this election did not interpret the right of

a contest to allow a manual recount in a contest when a manual recount had been rejected by the county. *Hogan*, 607 So. 2d at 510 ("Although section 102.168 grants the right of contest, it does not change the discretionary aspect of the review procedures outlined in section 102.166.") Finally, if votes are rejected because they were produced by a manual recount that came in after the statutory deadline, FLA. STAT. § 102.111, then they are rejected legally, not illegally, and thus do not represent the rejection of legal votes.

In short, rejecting ballots that the county boards or election commission legally deemed non-votes according to the statutory directions of the Legislature cannot constitute the improper "rejection of . . . legal votes" under the contest statute. To say otherwise would mean that the Legislature was requiring or authorizing county boards and election commissions to make a decision not to count certain votes that the Legislature later would want overturned by courts in a contest action. Such a reading would be completely nonsensical — the Legislature cannot have meant to require or authorize election agencies to act in a way the Legislature thought courts should deem illegal.

Consistent with this, the interpretation of Florida's contest statute before this election has always required that the plaintiff prove "substantial noncompliance with the election statutes" as well as a "reasonable doubt" as to whether the illegal noncompliance affected the outcome. *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720, 725 (Fla. 1998). For example, in rejecting a contest action seeking a manual recount because of partially perforated chads, the court held: "All that should have been considered by the lower court was whether appellant failed

to perform some mandatory statutory act or whether there were any electoral improprieties which had, not possibly might have, an influence on the ultimate choice of the voters." *Hogan*, 607 So. 2d at 510.

The 1999 amendments to the contest statute were not intended to change the requirement of proving some substantial illegality by election officials since the plain language required an illegal "rejection of legal votes." FLA. STAT. § 102.168(3)(c). Indeed, the legislative history made plain that the Legislature was only trying to codify existing law, not alter it. The Final Legislative Analysis stated that the 1999 "bill *codifies* the grounds for contesting an election" by, among other things, adding the language of § 102.168(3)(c). *See* Fla. H.R. Comm. on Election Reform, HB 281 (1999), Final Analysis (July 15, 1999), at 6, 7 (emphasis added). There is thus absolutely no reason in either the text or legislative history to think the 1999 amendments dropped the substantial noncompliance requirement that has long been necessary to bring a contest under Florida law.

B. The Florida Supreme Court Has Engaged in Wholesale Deviations from the Legislative Directions.

The Florida Supreme Court has engaged in a wholesale re-writing of the legislative directions regarding the manner in which elections shall be conducted. Most of the re-writing is based on the Florida Supreme Court's empirical premise — contrary to legislative directions — that "interpretive" manual recounts more accurately reflect the "will of the voters" than counts by well-functioning machines, and that the Legislature could thus never have meant to deny any vote interpreted to exist by such a manual recount. *See Palm Beach County Canvassing Board v. Harris*,

2000 WL 1725434, at *4, 12-13 (Fla.); *Gore v. Harris*, 2000 WL 1801246, at *8-9, 11-12. This empirical premise about accuracy is dubious. Although machine counts doubtless have their inaccuracies, they distribute any error randomly across candidates, and there is no reason to think they are as likely to affect the outcome as the potentially biased errors made in manual counts, especially when the latter are made using shifting or vague standards. In any event, whether empirically accurate or not, the Florida Supreme Court was not entitled to use an empirical premise contrary to that of the Legislature in order to deviate from the legislative directions on the manner in which elections shall be conducted.

But that is precisely what the Florida Supreme Court did here. Because it adopted the contrary premise, it presumed that manual recounts must be allowed in cases where there was no claim that the machines or ballots were defective, but only the claim that manual recounts could interpret ballots more accurately than machine counts. By creating this newfound right to interpretive manual recounts, the Florida Supreme Court also created a "conflict" that otherwise would not have existed between the manual recount provisions and the seven-day statutory deadline, a purported conflict then used to justify the conclusion that the legislative deadline was ambiguous. *Palm Beach*, *supra*, at *7-8.[6]

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6. The Florida Supreme Court also cited a supposed statutory conflict between the "shall" and "may" provisions of FLA. STAT. §§ 102.111-112. *Palm Beach*, 2000 WL 1725434, at *9-10. Relying on the fact that § 102.112 was originally enacted later, the court resolved this conflict in favor of the "may" provision. But the court ignored the fact that both statutory provisions have been repealed (Cont'd)

Further, the Florida Supreme Court's decision to ignore all the Florida Legislature's statutory deadlines for manual recounts directly resulted from a combination of the court's unwarranted empirical assumption about the enhanced accuracy of interpretive manual recounts and its mistaken policy assumption that more accurate counts must trump any

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(Cont'd)
and re-enacted every other year. *See, e.g.*, Florida Statutes 11.2421, 11.2422 (1999). In each re-enactment, then, the Legislature must have thought the two provisions were consistent. They accordingly should be read to give meaning to both rather than to allow one to repeal the other. The court also ignored the fact that the legislative history of the original adoption of § 102.112 shows a clear intent to retain the deadline and mandatory wording of § 102.111. Although the Senate had proposed amending § 102.111 to extend the deadline from seven to thirteen days and to change the "shall" to a "may", *see* 1989 Senate Journal, p. 819, the House rejected both amendments, *see* 1989 House Journal, p. 1320, and then the Senate agreed to the House version. Chapter 89-338, § 30 at 2162, Laws of Florida. The intent of the Legislature in enacting § 102.112 was thus not to extend deadlines or create discretion to do so. It was rather merely to codify *Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988), which provided only that the State Elections Canvassing Commission may include in its certification county returns that were not in the proper form but were timely under § 102.111, and did not authorize the Secretary of State or the Commission to delay certification to a later date. This interpretation (or the simple interpretation that § 102.111 is a direction and § 102.112 is a warning) can make the provisions consistent without, as the Florida Supreme Court did, rendering the Legislature's direction in the "shall" provision of § 102.111 meaningless. Since all "shall" provisions are read to avoid absurd results not contemplated by the Legislature, the fact that this "shall" provision would not be enforced in the event of a hurricane does not undermine this interpretation. But the possibility of manual recounts cannot be deemed an event uncontemplated by the Legislature when it set the deadline in the same statute that created the manual recount provisions.

contrary interest in finality. *Palm Beach*, *supra*, at *4, 12-13; *Gore*, *supra*, at *8-9, 11-12,*16-18. In doing so, the Florida Supreme Court has ordered the inclusion of the Broward County manual recount in violation not only of the legislative deadline, but of this Court's remand vacating the Florida court's earlier decision until that court could explain how it could reach such a conclusion without circumscribing the legislative power or putting Florida's electoral votes at risk. Indeed, the Florida Supreme Court required the inclusion of manual recounts from Miami-Dade and Palm Beach County in contravention not only of the statutory deadline, but also of the deadline which that court itself had set in its earlier opinion. *Gore*, *supra*, at *14-18. Finally, the court required new manual recounts in all the other counties even though such manual recounts had never been requested by any party and plainly cannot be finished before December 12. *Id.* at *7-9, 17-18.

In short, the new rule the Florida Supreme Court now wishes to promulgate is not only that manual recounts must always be done in any close election, but that there can never be any deadline for completing such a manual recount. This is a complete reversal of the legislative directions for how elections should be conducted, and it clearly violates Article II of the United State Constitution. All this flows from the court's position that the top priority should not be what the Legislature directed but rather should be completing as broad a manual recount as possible on the dubious empirical and normative assumptions that this better ascertains the will of the voter and matters more than finality.

In its first opinion, the Florida court was quite plain in basing its position on its view of state constitutional law rather than a technical reading of the Legislature's statutory

directions.[7] Chastised by this Court for doing so, the Florida Supreme Court has tried to minimize direct references to the state constitution in its more recent opinion. But the court continued to incorporate that state constitutional principle

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7. *Palm Beach*, *supra*, at *15 ("*Because* the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited . . . to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, *misses the constitutional mark. The constitution eschews punishment by proxy*"); *id.* at *11 ("To determine the circumstances under which the Secretary may lawfully ignore returns . . . it is *necessary* to examine . . . constitutional law at both the state and federal levels."); *id.* at 12 ("To the extent that the Legislature may enact laws regulating the electoral process, those laws are *valid only* if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage" guaranteed by the state constitution."); *id.* ("Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote . . . ."); *id.* at *13 ("Based on the foregoing [discussion of only state constitutional law], we conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances as we set forth in this opinion."); *id.* ("To disenfranchise electors in an effort to deter Board members, as the Secretary in the present case proposes, is unreasonable, unnecessary, and violates longstanding [state constitutional] law."); *id.* ("Technical statutory requirements must not be exalted over the substance of this right" of franchise under state constitutional law.); *id.* at *4 ("the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases"); *id.* ("the will of the people is the paramount consideration . . . to reach the result that reflects the will of the voters, whatever that might be [is our] fundamental principle"). Emphases added throughout.

by reference, repeatedly relying on a case that articulated an intent of the voter standard based on state constitutional law. *Gore*, *supra*, at *8-9, 11 (relying on *Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975)). Moreover, the court below has continued to enforce the manual recounts included as a result of its vacated opinion without explaining, as this Court asked it to do on remand, how its requirement that those tardy manual recounts must be accepted could be based on anything other than state constitutional constraints. In any event, the Florida court's imposition of its conception of what best measures the will of the people is hardly rendered more palatable under Article II if that conception is based on these judges' preferred policy rather than on state constitutional law. The important defect is that this conception (whatever its source) deviates from the directions the Legislature itself plainly left in its statutes.[8]

The Florida Supreme Court's view that all other legislative directions should be subordinated to the court's view about the primacy of manual recounts also led it to several other deviations from the Legislature's carefully crafted scheme. Because the Secretary's opinion and interpretation conflicted with the court's absolutist preference for manual recounts, the Florida court did not follow the statutory provisions making her opinions and interpretations binding on county boards. *See supra.*

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8. At many points, the Florida Supreme Court cites statutory sections for its "intent of the voter" test. *Gore*, *supra*, at *9, 11. But here the court seems to conflate the statutory proposition — which was that, *if* a manual recount should be done and could be completed within statutory deadlines, it should be conducted pursuant to a clear intent of the voter standard — with the court's own entirely different proposition that a manual recount done under an intent of the voter standard is always required and preferable to a machine recount no matter the circumstances or deadlines.

The Florida Supreme Court also abandoned the requirement that a contest plaintiff prove substantial noncompliance with law: that is, that the plaintiff has proven, as FLA. STAT. § 102.168(3)(c) requires, the illegal rejection of what are legally votes, rather than merely proof of the legal rejection of what legally are non-votes. *See supra.* Thus, the Florida Supreme Court rejected any abuse of discretion review of the board's decision to conduct a manual recount, *Gore, supra*, at *6, even though that was plainly part of the statutory scheme and case law interpreting it prior to this election. *See supra.*[9] It also found actionable the entirely proper rejection of votes that were provided after the statutory deadline. The Florida Supreme Court's abandonment of the substantial noncompliance requirement for contests not only deviated from law before the election, but also deviated from that same court's unanimous decision last week in the butterfly ballot case, which rejected plaintiff's claims for failure to prove "substantial noncompliance." *Fladell v. Palm Beach County Canvassing Bd.*, 2000 WL 1763142, at *2 (Fla.)

In effectuating its preference for manual recounts, the Florida Supreme Court has also deviated in multiple ways from the statutory conditions for *how* manual recounts may be conducted. The Florida Supreme Court decision now requires that manual recounts be done just for ballots that the machines interpreted as not registering a vote rather than

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9. If the court meant that a county refusal to do a manual recount is always wrongful when the election is close, that decision plainly contraverts the statutory provisions limiting manual recounts and giving county boards discretion over whether to do them. *See supra.* If the court meant that a non-wrongful county decision could be found actionable in a contest action, then it contraverts the contest statute and the substantial noncompliance test.

for all ballots counted by these machines. *Gore*, *supra*, at *7. This contravenes the legislative direction in FLA. STAT. § 102.166(5)(c), which provides that if a manual recount because of machine error is done, it must be of "all ballots" counted by such machines. Moreover, the Florida Supreme Court ignored the problem that, if machines were misinterpreting ballots, that problem also applied to overvotes, *see Gore*, *supra*, at *20 n.26 (Wells, C.J., dissenting), and to what were otherwise registered as votes. For example, if a hanging chad equals a vote that converts a machine undervote into a legal vote, then it also equals a vote than can convert a single vote into a double vote that makes the ballot invalid. The only way to get a count that consistently applies the same standard for all ballots would thus be manually to count *every* ballot rather than just "undervotes," which is precisely what the Legislature directed.

The Florida Supreme Court has also ordered that manual recount figures must be included even though derived under standards that demonstrably differed between the counties that have already done manual recounts, each of which also differed from the prior practice of not counting chads unless two corners are perforated. *See supra.* The court also orders future counting to be done under standards that are permitted to vary across 64 more counties. These court orders deprive the process of the statutorily required uniformity and bar the Department of State from exercising its statutory duty to assure such uniformity. *See supra*. Such changing, vague, and varying standards also create, as discussed below, severe risks for Florida's electoral voters under 3 U.S.C. § 5 and the equal protection clause.

II. THE FLORIDA SUPREME COURT HAS JEOPARDIZED FLORIDA'S PARTICIPATION IN THE ELECTORAL COLLEGE.

The Florida Supreme Court has jeopardized Florida's participation in the Electoral College in disregard of this Court's prior admonition, clear legislative wishes, and the Florida Supreme Court's own prior decision.

Federal election law provides that a state's election results are not binding on Congress when it counts the electoral results unless all controversies regarding that election are resolved by December 12 and "pursuant to" pre-existing law. 3 U.S.C. § 5.

This Court has previously warned the Florida Supreme Court to take into account that "a legislative wish to take advantage of the 'safe harbor' [provided by 3 U.S.C. § 5] would counsel against any construction of the Election Code that *Congress* might deem to be a change in law." *Bush*, *supra*, at 6 (emphasis added). As this statement indicates, the question is not whether the majority of the Florida Supreme Court believes that its statutory construction constitutes a change in the law. The question is whether there is a reasonable risk that "Congress might deem" its statutory construction a change in law. Because any State Legislature would have a strong interest in assuring its electoral votes are counted by Congress, this seems to justify a strong canon that the construction of statutes governing Presidential elections must be interpreted to avoid arguable changes in law.

The analysis in Section I clearly establishes the existence of a reasonable risk that Congress might deem the Florida

Supreme Court to have altered pre-existing law.[10] Indeed, this risk has been heightened by the sharply divided 4-3 nature of the Florida opinion and the fact that the Florida court's own Chief Justice deems the opinion a clear departure from pre-existing Florida law. *See Gore*, *supra*, at *18 (Wells, C.J., dissenting) ("the majority's decision . . . has no foundation in the law of Florida as it existed on November 7, 2000"); *id.* at *25 (the majority opinion "not only changes a rule after November 7, 2000, but it also changes a rule this Court made on November 26, 2000.")

Finally, even if it did not involve such a clear departure from pre-existing law, the Florida Supreme Court majority opinion would vitiate Florida's safe harbor under 3 U.S.C. § 5 because it requires a manual recount that cannot fairly be completed and finally adjudicated before midnight December 11. This not only deviates from the Florida Legislature's wishes, but from the Florida Supreme Court's own prior opinion, which stated that manual recounts should not be counted if they would be "submitted so late that their inclusion will preclude Florida's voters from participating fully in the federal electoral process." *Palm Beach*, *supra*,

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10. Respondents will presumably reprise their argument that, as long as review by the Florida Supreme Court was provided for by enactments prior to the election, 3 U.S.C. § 5 cannot be violated. This contention fails to explain the "pursuant to" or "other methods" language of § 5, and is invalid for the other reasons explained in our prior amicus brief. In any event, even if all 3 U.S.C. § 5 did require was a prior regime for dispute resolution, that is emphatically *not* what U.S. CONST. ART. II, § 1, ¶ 2 requires. That constitutional clause requires that Electors be appointed in conformance with the directions of the State Legislature. A state supreme court that deviates from those directions thus violates the U.S. Constitution even if some form of judicial review in that court were provided by prior legislative enactments.

at *15. This led the Florida Supreme Court to set a firm deadline of November 26 for all manual recounts, which deadline the court expressly justified as necessary in order to assure completion of all contests before December 12. Yet now the Florida court has ordered further manual recounts (which of course might themselves be contested) in disregard of this weighty concern.

The Florida Supreme Court has regrettably assumed for itself the powers given to the Florida Legislature under the U.S. Constitution. Although the determination of the issues this raises is a political issue best left to the Florida Legislature and Congress, it is plain that today the only way to satisfy 3 U.S.C. § 5, and assure that Florida's electoral votes are counted in the electoral college, is for this Court to reverse the Florida Supreme Court and resolve the pending contest. It would be a travesty, after all Florida has been through these past few weeks, for the end result to be that all 6 million voters in Florida might be disenfranchised in the Electoral College.

III. THE DECISION OF THE SUPREME COURT OF FLORIDA RISKS THE REJECTION OF FLORIDA'S ELECTORS BY CONGRESS BECAUSE THE METHOD IT DECREED FOR THEIR SELECTION VIOLATES EQUAL PROTECTION.

The right to vote is a fundamental right. The disparate treatment of persons or groups of persons in respect to access to the vote, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), or in respect to the way in which their vote counts or is counted towards the end for which the election is conducted, *Reynolds v. Sims*, 379 U.S. 870 (1964), must meet

the strictest standard of constitutional review. These constitutional constraints apply to the methods by which a State selects Presidential electors. *Williams v. Rhodes*, 393 U.S. 23 (1968).

The decision of the Supreme Court of Florida, if allowed to stand, would set in motion a process that counted or rejected votes on an extremely wide range of standards — full perforation, various degrees of partial perforation, some degree of indentation or dimpling of the area intended to be perforated, counting only consistent dimpling, counting dimples if the voter voted for the candidates of the same party for other offices — all under the capacious and unconstraining rubric of the "intent of the voter." A scheme that assumes and explicitly countenances disparate treatment of this kind need not be shown to be carried out for some sinister or discriminatory purpose (as in *Yick Wo v. Hopkins*, 119 U.S. 536 (1886), or *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985)). It is sufficient that this intentionally disparate treatment is arbitrary and detrimental. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438 (1982) (Blackmun, J. concurring); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).[11]

Of course, this is especially true where a scheme is set up that unjustifiably discriminates between persons in respect to the enjoyment of a fundamental right. Imagine a scheme like the one ordered by the court in this case, but instituted explicitly and in so many words by the State Legislature:

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11. As we have pointed out, the legislative scheme scrupulously adheres to the principle of equality and uniformity in the standards for interpreting ballots during manual recounts. FLA. STAT. § 101.5609(8) ("standards shall ensure that ballots are counted in a uniform and consistent manner").

> In conducting a manual count of punch card ballots, the counters must determine the intent of the voter. The intent of the voter may (or may not) be discerned only if the perforation is complete, or may (or may not) be inferred from an indentation, however faintly discernible in the vicinity of the chad, or may (or may not) depend on the pattern of indentations or parties of the other candidates voted. The criteria for discerning the intent of the voter shall depend on the county in which the contest takes place — or the precinct, or the identity of the counter, or the time of day.

Such a scheme would manifestly violate equal protection. But this was precisely the scheme the court below knowingly instituted in this case. And it is no justification that the court found it difficult or embarrassing to arrive at the specification necessary to render that scheme uniform.

Petitioners phrase their complaint in this regard in terms of a violation of due process as well. In cases such as this, where the law imposes arbitrary distinctions there is not a great difference between that rubric and that of equal protection. Thus *Logan v. Zimmerman Brush*, *supra*, in which the administration of a scheme led to severely disparate treatment for no good reason, was analyzed by four Justices in terms both of equal protection and due process. A similar point holds for the fundamental rights of speech and assembly. Although government may sometimes condition those rights on the obtaining of a license or permission, the grant of authority to the relevant officials may not be so vague and devoid of guidance as to invite arbitrary or discriminatory treatment. "A law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must

contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 131 (1992) (internal quotations omitted). No less should be demanded here where officials are charged with determining whether to count votes and which votes to count. Here too, a fundamental right is at stake and there must be "narrow, objective and definite standards" governing the exercise of official discretion. The process the court below set in motion granted the officials administering it a discretion that was broad, subjective and indefinite. If these officials had been charged with issuing parade permits, this Court would not tolerate such standardless discretion. Nor should it tolerate it here, where it affects the right to vote.

The decision below creates a system for counting Presidential votes so replete with arbitrary and unjustifiable distinctions that it violates Equal Protection. Even if a single slate of Presidential electors were appointed pursuant to such a scheme and voted in the Electoral College, there is a significant possibility that such a slate would subsequently be invalidated by the courts, leaving Florida unrepresented in the Electoral College. Or even if the courts did not step in, Florida risks having any electors so designated rejected by the Congress. Under 3 U.S.C. § 15, Congress will only count the votes of electors that have been "regularly given." It is axiomatic that votes given by electors chosen in violation of the Constitution have not been "regularly given," and thus might never be counted.

CONCLUSION

This Court should reverse the decision of the Florida Supreme Court and provide a final determination of contests in this election by midnight December 11, which will assure Florida's Electors are represented in the Electoral College.

Respectfully submitted,

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DEC 10 2000
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00-949 (00-A504)

THE SUPREME COURT OF THE UNITED STATES OF AMERICA

GEORGE W.BUSH and RICHARD CHENEY,
Applicants

v.

ALBERT GORE, JR., *et al.*,

EMERGENCY APPLICATION FOR STAY OF ENFORCEMENT OF THE JUDGEMENT BELOW PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Motion to File a Brief as *Amicus Curiae* or in the Alternative Motion to Intervene for the Purpose of Allowing Cameras in the Courtroom and Brief as *Amicus Curiae* or as Intervenor

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Motion to File a Brief as *Amicus Curiae* or in the Alternative Motion to Intervene for the Purpose of Allowing Cameras in the Courtroom

COMES NOW Movant, Mary Ann Smania, a citizen of the United States, a resident of Lake County, Florida, and moves this Court for leave to file a brief as *amicus curiae* or in the alternative to intervene in the above referenced matter and in support thereof states as follows:

1. Movant is a degreed sociologist, and a resident of the state of Florida.

2. Movant has attempted to raise judicial awareness of the use of cameras in the courtroom at the District Court level.

3. Movant seeks to apprise this Court of facts and perspectives relevant to the determination of permitting the use of cameras in the courtroom, more particularly described in the arguments contained in the accompanying brief.

4. There is great public interest and purpose to be served in allowing the use of cameras in the courtroom in the above styled action.

5. The Court should grant this motion and consider the novel arguments raised in support of permitting cameras to be present at the oral arguments on Friday, December 1, 2000. This Court's decision to permit cameras in the courtroom on this historic occasion will have a significant beneficial impact on the American people's perception of and confidence in their judicial system.

6. As a result of the shortened time for filing of these documents, Movant has included her brief as *amicus curiae* as a practical necessity.

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THE COURT SHOULD ALLOW CAMERAS IN THE COURTROOM DURING ORAL ARGUMENTS IN THIS HISTORIC CASE.

The Constitution of the United States is carefully tailored to design a system of checks and balances for the Executive and Legislative Branches. No such counterbalance exists for the Supreme Court of the United States.

The Supreme Court is only guided by the broad limits set forth by the United States Constitution and the Court's inherent judicial power with no other oversight. The Supreme Court, however, indirectly supervises the promulgation of the rules and procedures for the United States District and Circuit Courts.

The District Courts of the United States promulgate their own rules and procedures under the authority of 28 U.S.C. § 2071(a) that provides in pertinent part:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business.

U.S.C. § 2071 (a). These rules are reviewed, not by a separate branch of government, but rather through the judicial council of each circuit whose only members come from the judiciary itself.

> Each judicial council shall periodically review the rules which are prescribed under [28 U.S.C. § 2071] by district courts within its circuit for consistency with rules prescribed under [28 U.S.C. § 2072]. Each council may modify or abrogate any such rule found inconsistent in the course of such a review.

28 U.S.C. § 332(d)(4). The Judicial Council of the circuit is comprised of "the chief judge of the circuit, who shall preside, and an equal number of circuit judges and district judges of the circuit." 28 U.S.C. § 332(a)(1). The exact number of judges to sit on the council is determined "by majority vote of all such judges of the circuit in regular active service." Id.

The makers of the District Court rules are therefore the very same members who apply these rules in the courtroom. This provision does not lend itself to innovative thinking, nor does it tend to inspire changes in the law to match the

advancements outside the judicial system in both technology and changing social norms.

The Judicial Councils which make the rules for the district courts in each Circuit follow the form of their appellate level counterpart, the Judicial Conference of the United States. The Judicial Conference of the United States is established under 28 U.S.C. § 331.

> The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of International Trade, a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States.
>
> . . .
>
> The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. The Conference is authorized to exercise the authority provided in [28 U.S.C. §

> 372(c)] as the Conference, or through a standing committee.
>
> . . .
>
> The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.
>
> . . .
>
> The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

28 U.S.C. § 331.

The Judicial Conference suffers from the same in-breeding as the judicial councils. The Judicial Conference in effect, governs the Judicial Council and the District Court

systems, is exclusively comprised of appellate and district level judges, and is presided over by the Chief Justice of the United States Supreme Court. This system of self- governance establishes little or no inspiration or input for the Conference to adapt court procedures consistent with the technological and social standards governing the rest of American society, thus alienating the judicial system from the American people.

At the Supreme Court level, there is no governing body at all. The Supreme Court, acting in isolation and with little input from other sectors of American society, has carte blanche to establish rules and procedures for itself. Because the Court establishes the tone and setting for both the Judicial Conference and Judicial Councils, the natural effect of the Court's isolation from other sectors of American society is to negatively impact the rule making capacity of all the federal courts.

How can the federal courts avoid this isolationism and enhance the confidence of the American people in their judicial system? One method would be to re-examine the current

judicial policy of prohibiting video and still cameras in the courtroom. This prohibition is illustrative of one such critical area where the self-governance of the Judicial Branch acts to protect and isolate the court system from the very people it is designed to serve.

Movant, Mary Ann Smania, a degreed sociologist has unsuccessfully attempted to bring the issue of the use of cameras in the courtroom to the attention of lower court jurists as part of her belief that the American judicial system is in need of major procedural reform. She contends that the judicial branch of government has failed to embrace non-juridical disciplines such as the cultural, social and economic dynamics of a diverse American people. Each time Movant has attempted to raise these issues, local rules prohibiting the use of cameras in the courtroom have stymied Movant in her attempt to compel the judiciary to confront these issues and to bring them to the public's attention.

The Supreme Court is the only arm of the Judicial Branch that has the power to take the bold step in bringing cameras into the courtroom, and thus bringing the courts closer to the people. In the modern age of technology, where most Americans get their news and information from television and computers it is an anachronism to prohibit camera use in the courtroom. In order to fulfill the First Amendment right of free speech, free and complete information from all government sources, including the courts, is indispensable. The marketplace of ideas is no longer in the town-square, but has moved into cyber and video space. Just as an appellate court cannot discern the demeanor or credibility of a witness at the trial court level from the transcript of the trial court proceedings, so too the American public cannot understand the full passion, viability and conviction of a party's position without being present in the courtroom. Cameras in the courtroom give the public an opportunity to observe first hand the dispensation of justice, and in the instant case, to witness history in the making.

CONCLUSION

The Movant is a sociologist with a non-pecuniary interest in this issue. The eyes of the nation are upon this Court and the voice of the nation is clear. The decision this Court will reach will decide the fate of the American people. It is with this in mind that the Court should consider the issue of permitting cameras in the courtroom to record this historical event.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Movant's Motion to File a Brief as *Amicus Curiae* or in the Alternative Motion to Intervene and Brief as *Amicus Curiae* or as Intervenor has been sent by Federal Express to Theodore Olson, attorney for George W. Bush, at Gibson, Dunn & Crutcher, 1050 Connecticut Avenue Northwest, Washington, D.C. 20036: Laurence H. Tribe and Ronald A. Klain, attorneys for Albert Gore, Jr., c/o Gore Lieberman Recount Comm., Hauser Hall 420, 430 S. Capitol Street, Washington, D.C. 20003; and David Doies, attorney for Palm Beach County Canvassing Board, at Doies & Schiller, 80 Business Park Drive, Suite 110, Armonk, New York, 10504, this 10th day of December, 2000.

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Dec 10, 2000

No. 00-949

Supreme Court, U.S.
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In the Supreme Court of the United States

George W. Bush, et al.,

Petitioners,

v.

Albert Gore Jr., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICUS CURIAE BUTTERWORTH IN SUPPORT OF RESPONDENT GORE ET AL.

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INTEREST OF THE AMICUS

The Florida Attorney General is the state's chief legal officer. Art. IV, sec. 4(c), Florida Constitution. The Attorney General has broad common law powers to act on the state's behalf. *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976).

As the state's chief legal officer, the Attorney General has a fundamental interest in the constitutional operation of Florida government and in maintaining the proper relations between its branches, as established in the state constitution. This proceeding challenges, inter alia, the authority of the State's highest court to resolve disputes involving the selection of presidential electors. In so doing, the proceeding raises important issues of federalism and the authority of Florida to resolves state-law disputes in the manner the State deems appropriate. The Attorney General should be heard on these important issues.

SUMMARY OF THE ARGUMENT

When the Florida Legislature enacted a method for selecting presidential electors by general law applicable to all state elections, it understood that elections contests would be subject to judicial review. Had the Legislature wished to exempt presidential elections contests from judicial review it could have done so. But it did not.

Florida law provides constitutionally adequate procedures for determining voter intent.

ARGUMENT

The constitutional sovereignty of the states to judge their own laws, and the interplay of state statutes and state constitutions, have been jeopardized by positions asserted by the petitioners solely to gain an advantage of the moment. But such transitory individual interests must give way to fundamental constitutional principles of federalism and the rights of states to govern themselves.

U.S. Const., Art. II, sec. 1, cl. 2 confers a right upon each "State" to appoint presidential electors in such manner as the Legislature thereof may direct." The petitioners assert that, because of U.S. Const., Art. II, sec. 1, cl 2, the state judiciary has no jurisdiction to resolve conflicts in state elections laws pertaining to the appointment of presidential electors. Petitioners' propose a dangerous precedent which is contrary to the Founders' intent, this Court's prior holdings and the constitutionally protected concept of state sovereignty.

I. THE FLORIDA LEGISLATURE INTENDED THAT THE STATE SUPREME COURT WOULD HAVE JURISDICTION TO REVIEW STATE STATUTES REGARDING THE MANNER OF APPOINTMENT OF PRESIDENTIAL ELECTORS. FLORIDA STATUTES AUTHORIZE THE FLORIDA SUPREME COURT TO INTERPRET AND APPLY FLORIDA ELECTIONS LAWS.

The majority opinion of the Florida Supreme Court took great care to respond to this Court's earlier admonishment to reveal the precise grounds for its holding. The challenged opinion contains a detailed analysis of the Florida statutory and Florida case law upon which it is based — all legal precedents in existence *prior* to November 7, 2000. Dec. 8 Florida

Opinion, p. 6. The opinion demonstrates the existence of long-standing statutes and case law establishing the Florida Supreme Court's jurisdiction to review the matters at issue in this case and supporting the substance of that holding.

As noted by the Florida Supreme Court, "the [Florida] Legislature has prescribed a single election scheme for local, state and federal elections. The Legislature has not, beyond granting to Florida's voters the right to select presidential electors, indicated in any way that it intended that a different (and unstated) set of election rules should apply to the selection of presidential electors. . . ." Dec. 8 Florida Opinion, p. 18, f.n. 11. The Legislature has, thus, chosen to prescribe the manner for appointment of its presidential electors *by general statute,* authorizing a popular election. Section 103.011, Fla. Stat.

Contrary to Petitioners' assertions here, the Legislature has itself incorporated the State Constitution into the statutory methods of dispute resolution. The Legislature has declared that "[t]he State Constitution contemplates the separation of powers among the legislative, executive, and judicial branches of the government" and *has delegated* to the judicial branch the responsibility for "adjudicating any conflicts arising from the interpretation or application of the laws." Section 20.02(1), Fla. Stat. This provision of statutory law thus enacts the constitutional authority of the courts as described in the Florida Constitution, including Article V, Section 3(b) which establishes the jurisdiction of the State Supreme Court.

The legislature has made no exception or express exclusion of the elections laws pertaining to appointment of presidential electors from that statutory grant of authority. The laws of Florida confirm that, if the Legislature had wanted to create such an exception, it knew how to do so. For example, Florida

law imposes such a limitation on judicial review in the context of legislative elections.[1]

Florida law does vest initial jurisdiction in the Florida circuit courts to hear election contests pursuant to Florida Statutes 102.168. But the legislative design is that a circuit court's decision is subject to review by a higher court, and no exception is made for presidential electors. This statutory design does not violate Art. II, sec. 1.

As this Court noted in *Bush v. Palm Beach County Canvassing Board*, case no. 00-836 (December 4, 2000), "[a]s a general rule, this Court defers to a state court's interpretation of a state statute." *Bush*, p. 4. It is particularly imperative that this principle be scrupulously adhered to where, as here, the state court decision concerns a matter entrusted to the states by express federal constitutional grant. This Court should not intrude on the resolution of these state law matters by the state's highest court and should not disturb the judgment of the Florida Supreme Court regarding the adjudication of a conflict arising from the interpretation and application of Florida's elections laws – a matter statutorily conferred *by* the Florida legislature *on* the Florida courts.

We suggest further that petitioner's reliance on *McPherson v. Blacker*, 146 U.S. 1 (1892), and this Court's opinion in *Bush v. Palm Beach County Canvassing Bd.*, Petitioners' Exh. D, to exclude the judiciary from the state-authorized methods of

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[1] See e.g. Art. III, sec. 2, Fla. Const., which provides in relevant part that:

Section 2. Members; officers.– Each house shall be the sole judge of the qualifications, elections, and returns of its members . . .

resolving presidential election disputes is misplaced. Perhaps no precedent of this Court more plainly establishes the jurisdiction of the judiciary, both at the state and federal levels, to interpret laws concerning a state legislature's directions regarding the manner of appointing electors than does *McPherson v. Blacker*. The petitioner argues that this Court "reemphasized" in *Bush, supra*, that "the federal constitution 'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power' of the State. *Bush*, [Petitioners'] Exh. D. at 5 (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892))." Petitioners' Stay Petition, p. 24. However, neither *Bush* nor *McPherson* reaches such a conclusion.

As this Court noted in *Bush*, the question the petitioners raise here was not addressed in *McPherson v. Blacker*, *supra*. Slip Op. p. 4. Indeed, in direct contravention to the petitioners' premise here, the complete quotation from *McPherson v. Blacker*, 146 U.S. at 25 reads as follows:

> The legislative power is the supreme authority, *except as limited by the constitution of the state,* and the sovereignty of the people is exercised through their representatives in the legislature, *unless by the fundamental law* power is elsewhere reposed. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. What is forbidden or required to be done by a state is forbidden or required of the legislative power *under state constitutions as they exist.* The clause under consideration does not read that the people or the citizens shall appoint, but that 'each state shall;' and if the words, 'in such manner as the legislature thereof may direct,' had been omitted, it would seem

> that the legislative power of appointment could not have been successfully questioned *in the absence of any provision in the state constitution* in that regard. Hence the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

(Emphasis supplied).

The context of *McPherson* makes clear that it is an appropriate and expected role of the state judiciary to interpret and review even those laws enacted by state legislatures that concern the manner in which electors are appointed. The issue in *McPherson* was whether Art. II, sec. 1, cl. 2 authorized states to choose electors in district elections rather than statewide. The case came to the court *after* review and determination *by the Michigan Supreme Court* on the validity of the statute. The Michigan Supreme Court had determined it was within the power of a state legislature to direct district elections of presidential electors, but invalidated several provisions of the statute prescribing the times for doing certain things as violative of federal deadlines. This Court *affirmed* the holding of the Michigan Supreme Court — including that aspect of the holding invalidating the timing provisions.

Further, in *McPherson*, this Court looked *to the constitution of the state of Michigan* in analyzing one of the provisions of the statute rejected by *both* the supreme court of Michigan *and* this Court. *McPherson v. Blacker*, 146 U.S. at 41. Had this Court believed that neither the state constitution applied nor the state judiciary had jurisdiction to interpret and review the validity of a statute enacted in pursuit of a state legislature's authority under Art. II, sec. 1, cl. 2, this Court would have so

stated in ruling on the challenge to the Michigan Supreme Court's holding. However, rather than holding that the state supreme court lacked jurisdiction over such matters, as now asserted by the petitioners, this Court *affirmed* the state supreme court's order — including the part invalidating portions of the state elections statute. *McPherson v. Blacker*, 146 U.S. at 41, 42.[2] See *Smiley v. Holm*, 285 U.S. 355 (1932), holding that the grant of authority to a state legislature in U.S. Const., Art. I, sec. 4 was conditioned by the authority given to the state legislature under its state constitution.[3] *See also, Davis v.*

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[2] "We entirely agree with the supreme court of Michigan . . . and are of the opinion that the date may be rejected, and the act held to remain otherwise complete and valid."

[3] The Court specifically held that:

> Whether the Governor of the state, through the veto power, shall have a part in the making of state laws, is a matter of state polity. Article 1, sec. 4, of the Federal Constitution, neither requires nor excludes such participation. And provision for it, as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority. . . That the state Legislature might be subject to such a limitation, either then or thereafter imposed as the several states might think wise, was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that the Congress in making its regulations under the same provision would be subject to the veto power of the President, as provided in article 1, s. 7. The latter consequence was not expressed, but there is no question that it was necessarily implied, as the

Hildebrant, 241 U.S. 565, 567 36 S. Ct. 708, 709 (1916) ("It was because of the authority of the state to determine what should constitute its legislative process that the validity of the requirement of the state Constitution of Ohio, in its application to congressional elections, was sustained.").

Unquestionably, state legislatures have great latitude under Art. II, sec. 1, cl. 2, in directing the manner of appointment of electors in the state.[4] Article II should not be interpreted as precluding a State from resolving disputes concerning the selection of electors pusuant to the State's constitutionally authorized structure. In the case at bar, there is no conflict between the election laws and the Constitution. The clear design of the Legislature is that the election laws and Constitution would work in tandem and provide meaning to each other.[5]

Congress was to act by law . . .
Smiley v. Holm, 285 U.S.. at 368-369.

[4] "This provision, one of the few in the constitution that grants an express plenary power to the States, conveys 'the broadest power of determination' and '[i]t recognizes that [in the election of a President] the people act through their representatives in the legislature, and *leaves it to the legislature exclusively to define the method of effecting the object.' McPherson v. Blacker*, 146 U.S. 1, 27, 13 S.Ct. 3, 7, 36 L.Ed. 869 (1892) (emphasis added [in original])." *Anderson v. Celebrezze*, 460 U.S. at 806-807, 103 S.Ct. at 1579 (dissenting opinion).

[5] Under *federal* law, a state's power to establish the manner of selecting electors is not absolute. For example, once a state confers a right to vote for presidential electors, that right cannot be abridged in a manner that violates federal

Therefore, the Supreme Court of Florida had jurisdiction to enter its order and this Court should not disturb that court's interpretation of Florida law. This Court should affirm the jurisdiction of the Florida state courts and reject the petitioners' assault on the vitality of Florida's laws and constitutions under the guise of Art. II, sec. 1.[6]

We further note that the weakness of Petitioner's argument regarding the meaning of Article II is revealed by applying their

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constitutional or statutory provisions. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 11 (1982).

Two United States Supreme Court cases, *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Anderson v. Celebrezzee*, 460 U.S. 780 (1983), speak to the limits imposed by federal constitutional provisions on the exercise of state legislatures' authority to direct the manner of choosing electors. Both cases make clear that the power of states to select electors to choose the President and Vice President cannot be exercised in such a way as to violate express *federal* constitutional commands. Both cases hold that, while Art. II, sec. 1 grants extensive powers to states to pass laws regulating the selection of electors, the provision does not give states power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. *Williams v. Rhodes*, 393 U.S. at 28-29; *Anderson v. Celebrezzee*, 460 U.S. at 794-795, 806.

[6] The Attorney General addressed the impact of 3 U.S.C. 5 in his brief in *Bush v. Palm Beach County Canvassing Board, Case No. 00-836* (Dec. 4, 2000). We stand with that analysis and contend that Section 5 has little meaning here, other than to provide a safe harbor for electors if certain circumstances arise.

analysis to overseas ballots which the State receives up to ten days following an election so long as the vote is cast before the close of the polls on election day. This extended time for receipt of ballots has not been enacted by the Legislature. Florida law requires that absentee ballots be received by the close of the polls on election day. The extended period results from orders entered in *United States v. State of Florida*, Civ. No. TCA 80-1055 (N.D. Fla.). The litigation was brought pursuant to the Overseas Citizens Voting Rights Act of 1975, 42 U.S.C. 1973dd *et seq.*, and the Federal Voting Assistance Act of 1955, 42 U.S.C. 1973cc(b). Those laws provided that states must allow military personnel and civilians overseas to vote by absentee ballot in federal elections pursuant to regular state absentee provisions. The federal statutes did not provide for the extended period to return ballots. But like the issues presented to the Florida courts resulting in the controversy today, the inter-workings of the Florida election code did not allow sufficient time to get the ballots back by election day. Thus, to resolve the conflict among the laws, it was agreed by the executive branch of our government that the deadline for return of ballots would be extended.

There is no question that military and overseas ballots should be granted this extension even though the Legislature has not enacted a law so providing -- but Petitioner's analysis leads to a contrary conclusion. Petitioners have contended that the extension is authorized by federal law notwithstanding Article II. But the federal law does not provide the extension, and it is questionable whether Congress would have authority to grant such an extension in the face of the Article II delegation to the states.

II. FLORIDA LAW PROVIDES ADEQUATE PROCEDURES FOR DETERMINING VOTER INTENT.

The petitioners attack the standards used during the review of ballots in the post-election contest, contending that they lack guidelines. The Florida Supreme Court followed state law governing election contest provisions by remanding the case back to the Circuit Judge to set guidelines during the ongoing "investigation and examination" phase of the election contest. In fact, circuit judge Lewis requested each county canvassing board to submit their standards for counting the ballots and determining "voter intent" as provided by Florida statutes. Unfortunately this process was interrupted by this Court's stay of the election contest.

Finally, the petitioners' argument raises the issue of what is a legal ballot, which is a matter of state and not federal law. The "legality" of a vote is not judged by whether it can be read by a machine or not, but by whether the intent of the voter can be ascertained by an examination of the ballot. The Florida Supreme Court properly held that, under Florida law in existence on November 7, 2000, "a legal vote is one in which there is a 'clear indication of the intent of the voter.'" Dec. 8 Opinion, p, 25. *See*, Section 101.5614(5), Fla. Stat. (2000) ("No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board."); Section 101.5614(6). Fla. Stat. (any vote in which the board cannot discern the intent of the voter must be discarded); Section 102.166(7)(b), Fla. Stat. ("If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent."). This Court should lift the stay and permit the lawful votes contained in the 45,000 "no registered vote" ballots, statewide, to be counted.

CONCLUSION

For these reasons, the Court must affirm the decision below, and allow the manual count of presidential ballots to continue.

RESPECTFULLY SUBMITTED,

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Dated: December 10, 2000

BEST AVAILABLE COPY

No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH and RICHARD CHENEY,

Petitioners,

v.

ALBERT GORE, JR., *et al.*,

Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Brief on the Merits of Katherine Harris, Florida Secretary of State, and Katherine Harris, Laurence C. Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission

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Brief on the Merits of Katherine Harris, Florida Secretary of State, and Katherine Harris, Laurence C. Roberts, and Bob Crawford as Members of the Florida Elections Canvassing Commission

I. Summary of the Argument

The Supreme Court of Florida created many new provisions in Florida's election laws on November 21, 2000, by applying common law and constitutional principles to change the opportunities for and method of conducting a manual recount, changing the dates for election certification, authorizing amendments to previously-filed certifications even after the statutory deadline had passed, removing much of the discretion granted to the Secretary of State to administer Florida's electoral system, and granting significantly expanded powers to local canvassing boards. *Palm Beach Canvassing Board v. Harris*, 2000 WL 1725434 *3 (Fla. Nov. 21, 2000) ("*Harris I*"), vacated, *Bush v. Palm Beach Canvassing Board*, 121 S. Ct. 471 (U.S. Fla. Dec. 4, 2000) ("*Bush I*"). This Court vacated that order and directed the Florida court to clarify its reasoning, which it has not yet done.

The decision below, while acknowledging the legislature's role, expands upon, and continues to give effect to, its vacated order and further encroaches upon the legislative scheme and the powers delegated by the legislature to the Department of State, the Division of Elections and the Elections Canvassing Commission. In particular, the decision (i) continues to allow manual recounting based on mere allegations of voter error, (ii) creates a new counting methodology, unknown in the legislative scheme, which allows vote tabulation equipment to

be used to screen votes for manual counting, and (iii) creates what is in effect an absolute right to a manual recount whenever the number of ballots counted with no-vote for an office exceed the margin of victory of one candidate. In addition, the court continued to apply, and actually expanded, the alternative certification deadline created in its previous order. As noted by Chief Justice Wells in his dissent, the decision of the Florida court "has no foundation in the law of Florida as it existed on November 7, 2000, or at any time prior to the issuance of [the decision below]." *Gore v. Harris*, 2000 WL 1800752 (Fla. Dec. 8, 2000) ("*Harris II*"), at 41 (Wells, C.J. dissenting).[1]

These actions by the Supreme Court of Florida do significant violence to the legislative scheme, in direct contravention of the exclusive grant of authority over presidential elections granted to state legislatures, makes *post hoc* changes to the Florida electoral system, and raises serious and far reaching concerns that would have been avoided by applying the Florida legislative scheme as written.

II. Statement of the Case and Procedural History

Both of the Florida Supreme Court's decisions *Harris I* and *Harris II* make substantial changes to Florida's Election Code, as it existed on November 7, 2000.

A. The November 21, 2000 Decision of the Florida Supreme Court (*Harris I*)

In *Harris I*, the Florida Supreme Court changed the election law of Florida as it existed on November 7 in several material respects:

1. The text of this opinion can be found at Tab A to Petitioner Bush's Index of Exhibits.

- County canvassing boards *now* have the authority to amend certified returns filed within the statutory deadline for up to 12 days after the deadline for certification of the election results to accommodate manual recounting (i.e., the protest period was extended from 7 to 19 days);

- The Commission *now* must accept amended election returns filed after the statutory deadline so long as the filing does not violate the Florida Supreme Court's judicially-created alternative deadline of November 26, designed to accommodate manual recounting in this election;

- The Commission *now* is to ignore its statutory duty to certify election results based solely on the returns filed within the seven-day deadline set by the Legislature, so that late-filed amendments may be submitted to reflect manual recounts that extend beyond the deadline;

- County canvassing boards *now* enjoy broad discretion to order manual recounts in selected counties for a statewide election, even when the "error in vote tabulation" (i.e., the failure of the tabulation system) required under the statute has been found not to exist, and irrespective of whether the recount will extend beyond the statutory deadline for filing election returns; and

- Where a uniform system of automated counting was previously in place, Florida's votes, including votes for the electoral college, will *now* be decided based on standards developed by individual canvassing boards in selected areas of the state.

From the outset of *Harris I*, the Florida Supreme Court made clear that "hyper-technical statutory requirements" must give way to the right of suffrage implicit in the Florida Constitution. *See id.* at *4 ("the will of the people, not hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases."); *id.* at *6 ("all political power is inherent in the people"). After reviewing the relevant portions of the Florida Election Code, the court observed that:

> the County canvassing Boards are required to submit their returns to the Department by 5 p.m. of the seventh day following the election. *The statutes make no provision for exceptions following a manual recount.* If a Board fails to meet the deadline, the Secretary is not required to ignore the county's returns but rather is permitted to ignore the returns within the parameters of this statutory scheme. To determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount, it is necessary to examine the interplay between our statutory and constitutional law at both the state and federal levels.

Id. at *11 (emphasis added).

The court then looked to principles of Florida constitutional law and stated that the judiciary must "attend with special vigilance whenever the Declaration of Rights is in issue," and that "[t]he right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished." *Id.* at *12.

In accordance with these general principles, the court held that "the Legislature may enact laws regulating the electoral process . . . only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage." *Id.*

Looking as well to principles of Florida constitutional law for guidance, the court concluded:

> Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited. The Secretary may ignore such returns only if their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either such case, this drastic penalty must be both reasonable and necessary. But to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, misses the constitutional mark. The constitution eschews punishment by proxy.

Id. at *15.

This Court subsequently granted Governor Bush's petition for certiorari review to address whether the Florida court's decision conflicted with federal constitutional and statutory law. *Bush v. Palm Beach Canvassing Board*, 2000

WL 1731262 (U.S. Nov. 24, 2000). On December 4, 2000, this Court issued an opinion in which it vacated the Florida Supreme Court's decision. *Bush v. Palm Beach County Canvassing Board*, 2000 WL 1769093 at *4 (U.S. Dec. 4, 2000). In its decision, this Court asked the Florida Supreme Court to clarify its opinion concerning its impact on the legislature's power to select the method of appointing electors for President and Vice President of the United States in light of 3 U.S.C. § 5 or article II of the U.S. Constitution. *Id.* In so doing, the Court counseled:

> Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.

Id. at *3. The Florida Supreme Court has not yet responded to this Court's mandate.

B. The Present Case (*Harris II*)

On November 27, 2000, Vice President Albert Gore, Jr. and Joseph I. Lieberman (the "Gore Respondents") filed an election contest under section 102.168(3)(c), Florida Statutes (2000), one day after the newly-created conclusion of the protest period. This section provides that an unsuccessful candidate may contest an election when there has been, among other things, a "rejection of a number of *legal votes* sufficient to change or place in doubt the result of the election." (Emphasis added.) After a two-day bench trial, the trial court denied the Gore Respondents any relief and entered a judgment in favor of the defendants. The Gore

Respondents immediately appealed. The intermediate district court of appeal passed the case through to the Florida Supreme Court.

On review, the Florida Supreme Court reversed the trial court in part and ordered that partial manual recounts previously performed by the canvassing boards of Miami-Dade and Palm Beach counties be counted notwithstanding the fact that they were certified after the judicially-created deadline set in *Harris I*.[2] Moreover, the court ordered a statewide manual recount of the so-called "undervotes" in all counties where the undervote had not been subjected to a manual recount. *Id.* at 2. The court's decision is bottomed on a holding that "a legal vote is one in which there is a 'clear indication of the intent of the voter' " (*Id.* at 25), which is borrowed from section 101.5614(5). That provision deals with counting of damaged or defective ballots, which are not at issue here.[3]

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2. This, of course, conflicts with the court's prior ruling that all manual recounts *had to be* completed by 5 p.m. on November 26, 2000. Even assuming the validity of the extension of the protest period, these counties were not able to complete their manual recounts on time and, therefore, should not have been able to amend their certifications. *See* Fla. Stat. § 102.111 (2000).

3. The proceedings in the trial court upon remand, and the trial court's order on remand entered before this Court's stay, are contained in Respondent's Appendix. The trial judge was constrained to a specific number of actions based upon the language of *Harris II*.

III. Argument

A. The Decision Below and in *Harris I* Dramatically Changed the Purpose for Which Manual Recounts May Be Used.

The Supreme Court of Florida's decision is a further extension of its previous holding and reflects further developments in the Florida Election Code. As noted by Chief Justice Wells in his dissent below, there is no basis under the section 102.168 or any other provision of the Election Code for a manual recount, let alone a recount of only the so-called "undervotes," when there is no justification other than voter error.[4] The Gore Respondents cite no instance in Florida election history when a manual recount was conducted because of an allegation that the total number of undervotes was greater than the margin of victory.[5]

Section 102.168, Florida Statutes, imposes a burden on the contestant to show, among other things, that "*legal* votes sufficient in number to change or place in doubt the result of the election" were rejected. Fla. Stat. § 102.168(3)(c) (2000)

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4. *See Harris II*, at 41 (Wells, C.J. dissenting) ("My succinct conclusion is that the majority's decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion.").

5. The appellees cannot rely on *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998). There, the issue was not — as has been asserted — voter error, but rather whether "fraud," "gross negligence" or "incompetence" by election officials who re-marked ballots so that they could be counted by an electronic scanner should void an election. *Id.* at 723-24.

(emphasis added). In this case, legal votes were not rejected. "Legal votes," as that term is used in section 102.168(3)(c), means votes properly executed in accordance with the instructions provided to all registered voters in advance of the election and in the polling places. By properly executing their ballots, voters can ensure that their vote will be counted by the tabulation machinery. Otherwise, these same voters risk having their vote disregarded. No other definition for "legal votes" fits the legislature's scheme.

The Division of Elections, charged with interpreting and enforcing the Florida Election Code, has opined that there is no basis in the legislature's scheme for a manual recount because of voter error. Consistent with the statutory scheme for manual recounts, legislative history and prior interpretation of the statute, the Division issued a formal advisory opinion,[6] stating that:

> [a]n "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. The inability of a voting system to read an improperly marked marksense or improperly punched punchcard ballot is not an error in the vote tabulation. Unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of the sample precincts is caused

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6. Although this opinion was written in the context of an election protest, the basis of the opinion is equally applicable to an election contest.

> by incorrect election parameters or software errors, a county canvassing board is not authorized to manually recount ballots for the entire county, nor perform any action specified in Section 102.166(5)(a) and (b) of the Florida Statutes.

Bush I JA 57. Both the plain language and legislative history of Florida's election statutes indicate that the Division was correct: a manual recount of the ballots is proper only when there has been a failure of the vote tabulation system, i.e., the counting apparatus. Fla. Stat. § 102.166(5) (2000).

The legislature has set out an elaborate system to ensure that all voters are educated on how to vote. In the weeks before the November 7, 2000, general election, each registered voter in the state was provided with a sample ballot and detailed instructions on how to vote according to the method used in his precinct. *Id.* § 101.46. For the instruction of voters on election day, each polling place is provided with instructions illustrating the manner of voting with the particular system in use. By law, before entering the voting booth, each voter is to be offered instruction in voting by use of the instruction model, and each voter is to be given "ample opportunity" to operate the model. *Id.* § 101.5611(a).

Additionally, a copy of the instructions was placed prominently in each voting booth. For those areas using punch cards, including Miami-Dade and Palm Beach counties, the instructions explained how a voter was to select and punch out the appropriate chad on the ballot. As is evident from the instructions used in Palm Beach County, the instructions were clear and complete. Harris Appendix to Response to Petition for Writ of Certiorari in Case No. 00-836.

The voter instructions were designed to prevent both undervoting and overvoting, and thus to ensure that each voter's choices were tabulated. To prevent undervoting, the instructions explained in oversize type that each voter must check his or her ballot card to make sure that the desired punched positions were fully perforated, and that no chad remained partially attached in the selected punch positions. The instructions included this specific action:

> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**

Id.[7]

To prevent overvoting, the instructions directed voters to refrain from attempting to correct mistakes on ballots. Voters were told to instead obtain a new ballot, on which their selections could then be properly noted: "If you make a mistake, return your ballot card and obtain another." *Id.* Any voter following this direction would have cast only one vote for each office and his or her ballot would have been at no risk of invalidation based on overvoting.

In case any voter, after entering the voting both, asks for instructions about how to vote, two election officers who are not members of the same political party shall assist and give instructions, then leaving the voter to vote in secret. *Id.*

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7. At no time, although frequently urged upon it, has the Florida Supreme Court made any comment upon these instructions and how they might impact the issue of voter intent.

§ 101.46. The fact that this assistance is available is made clear in the "NOTICE, Instructions to Voters" that are posted at all precincts. Moreover, all inspectors, clerks, and deputy sheriffs are given training classes for the purpose of instructing such persons in their duties and responsibilities as election officials. *Id.* § 102.012(8). In addition, sample ballots are furnished to each polling place as are a number of reduced-size ballots that are made available to any voter so requesting. *Id.* § 101.20.

When voters followed these instructions, the automatic tabulation system accurately tabulated the ballots. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices would have been affected by the manual recount at issue.

Plainly stated, the type of manual recount allowed — indeed, required by the Florida Supreme Court — does not address the failure of automated equipment to tabulate properly executed ballots, the only purpose for which manual recounts were allowed under Florida law as it existed on election day. The sole purpose of the recount mandated by the Florida Supreme Court is to allocate additional votes to certain candidates based on those ballots that voters failed to execute properly even after receiving clear instructions. To accomplish this result, small armies of local government employees are left to divine, without clear standards to guide them, the intent of electors who failed to clearly mark their ballots. Florida law in no way compels such a result. *See Fladell v. Palm Beach Canvassing Board*, 2000 WL 1763142 (Fla. Dec. 1, 2000) (rejecting challenge to Palm Beach County's so-called "Butterfly Ballot"); *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("Mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.").

There can be no doubt that the Florida Supreme Court's decision creates new rights and obligations. *See Harris II* at 55 (Wells, C.J., dissenting) ("Clearly, in a presidential election, the Legislature has not authorized the courts of Florida to order partial recounts, either in a limited number of counties or statewide. This Court's order to do so appears to me to be in conflict with the United States Supreme Court decision."). Again, the legislature was well within its right to set forth a scheme whereby voters that followed the proper procedure were deemed to have cast legal votes. *U.S. Const. art. II, § I.* Those who did not follow instructions ran the risk that their vote would not be counted. It is critical to note that the no votes at issue here include ballots that contain chads that for one reason or another were never fully dislodged. Under the Election Code, these votes are not legal votes. Moreover, there was absolutely no evidence that the ballots were damaged.

Another indication that manual recounts are not available for voter error is found in section 101.5606, Florida Statutes (2000). This section requires that all electronic or electromechanical voting systems used must be capable of correctly counting votes. If the Florida Supreme Court is correct in its broad definition of a legal vote, then there can no longer be any voting machines because those machines will never be capable of counting all the votes. The Florida Supreme Court's opinion relegates the voting machines to a screening device used to locate undervotes and is thus anathema to this section, among others, of the Code.

A simple reading of the Florida Supreme Court's decision, especially under the light of Chief Justice Wells' powerful and persuasive dissent, can lead to only three conclusions: (1) the Florida Supreme Court made new law

when it ordered a manual recount based on unsubstantiated allegations of voter error; (2) the court made new law by requiring that only the "undervotes" be counted, instead of *all* ballots; and (3) the court made new law by requiring a manual recount whenever the number of undervotes exceeded the margin of victory.[8]

B. Although the Court Below Created New and Unprecedented Rights to Manual Ballot Counts, it Created No Standards by Which Such Counts Are to Be Conducted.

Because the Florida legislature never authorized manual recounts to correct voter error, it has enacted no standards by which to judge improperly executed machine ballots. The utter lack of objective standards in the partial manual recount ordered by the court below will inevitably lead to a chaotic counting process with different counting methodologies being applied in different areas of the state:

> [T]he majority returns this case to the circuit court for a recount with no standards. I do not, and neither will the trial court, know whether to count or not count ballots on the criteria used by the canvassing boards, what those criteria are, or to do so on the basis of standards divined by [the

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8. In fact, that is what the court held. *Id.* at 23 ("Here, there has been an undisputed showing of the existence of some 9,000 'under votes' in an election contest decided by a margin measured in the hundreds. Thus, a threshold contest showing that the result of an election has been placed in doubt, warranting a manual count of all undervotes or 'no vote registered' ballots, has been made."). That is not what the statute says; this a new rule enunciated by the Florida Supreme Court to facilitate selective recounting.

> trial judge]. . . . It only stands to reason that many times a reading of a ballot by a human will be subjective, and the intent gleaned from that ballot is only in the mind of the beholder. This subjective counting is only compounded where no standards exist or, as in this statewide contest, where there are no statewide standards. . . .

Harris II at 56-57 (Wells, C.J., dissenting).

Other states, unlike Florida, that provide broad manual recount rights for correction of voter error also generally provide standards by which to judge the ballots. For example, Indiana provides clear and definitive standards for manual counts of erroneous ballots, requiring ballots with pierced or partially detached chads to be counted and ballots with mere indentations to be considered as having no vote. *See* Ind. Code Ann. § 3-12-1-9.5 (West 2000). The fact that Florida has no similar objective standards underscores that the Florida Legislature did not intend manual recounts to be used to correct voter error.[9] Many states, like Florida, use manual recounts solely to confirm machine calibration or correct machine failure.[10] Additionally, states with liberal

9. The only other conclusion would be that the legislature chose to enact a system that is so fraught with subjectivity that it denies due process and equal protection. A system that allows votes to be evaluated differently based on where the voter resides cannot stand. *See Reynolds v. Sims*, 377 U.S. 533, 563 (1964) ("Weighing the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids sophisticated as well as simplified modes of discrimination.").

10. *See, e.g.*, Col. Rev. Stat. 10-10.5-102 (West 2000) ("Prior to any recount, the canvass board shall choose a precinct at random (Cont'd)

manual recount rights, unlike Florida, almost invariably provide detailed standards by which to conduct those recounts.[11]

(Cont'd)
and a test number of ballots on which to conduct a machine count and a hand count of ballots. The precinct chosen shall have at least fifty ballots for the count. If the results of the machine count and the hand count are identical, then the recount shall be conducted in the same manner as the original ballot count."); Iowa Code Ann. § 50.48 (West 2000) ("If an electronic tabulating system was used to count the ballots, the recount board may request the commissioner to retabulate the ballots using the electronic tabulating system. The same program used for tabulating the votes on election day shall be used at the recount unless the program is believed or known to be flawed"); Neb. Rev. Stat. § 32-119 (West 2000) ("The procedures for the recounting of ballots shall be the same as those used for the counting of ballots on election day. . . . Counties counting ballots by using a vote counting device shall first recount the ballots by use of the device. If substantial changes are found, the ballots shall then be manually counted in any precinct which might reflect a substantial change."); W. Va. Code § 3-4A-28 (West 2000) ("[Ballots . . .] shall be reexamined . . ., in the same manner . . . utilized in the original vote count. . . . During . . . any requested recount, at least five percent of the precincts shall be chosen at random and the ballot cards cast therein counted manually. The same random selection shall also be counted by the automatic tabulating equipment. If the variance between the random manual recount and the automatic tabulating equipment count of the same random ballots, is equal to or greater than one percent, then a manual recount of all ballot cards shall be required.").

11. *See, e.g.*, Cal. Elec. Code §§ 15628-15631(West 2000) (detailing exact procedures for manual recounts); Ind. Code Ann. § 3-12-1-9.5 (West 2000) (detailing exact standards for "chad irregularities"; Tex. Elec. Code Ann. § 127.130 (West 2000) (detailing exact procedures for manual Counting, including "chad" standards).

Prior to the decision below and the *Harris I* decision, votes in Florida were counted according to an objective system based on approved and calibrated tabulation equipment.[12] Under this system, voters are required to indicate their votes in such a way that properly functioning tabulating equipment will register the vote. For this reason, voters were instructed to carefully check their ballots for mistakes, as exemplified in the instructions used in Palm Beach County and quoted *supra*. When voters followed these instructions, the tabulation equipment accurately tabulated the ballots according to their accepted operational parameters. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices would have been affected by the manual recounts at issue below.

Thus, the use of automated tabulation according to uniform performance standards for the tabulation equipment provided both uniformity and objectivity. Moreover, the equipment is accurate so long as ballots are properly executed. For these reasons, the Florida legislature chose to rely principally on automated equipment, with manual recounts being one of a series of remedies to be employed only when the equipment fails to operate as intended.

The decision below throws out the standardized system created by the legislature in favor of undisciplined and result-selective manual counting for the sake of divining the intent

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12. This automated equipment is regulated to ensure that a standardized result occurs for all properly cast ballots. *See* Fla. Stat. § 101.015. The Secretary has implemented this statute through administrative rules that regulate the performance of tabulating machines and designate a defined maximum error rate. *See* Fla. Admin. Code. R. 1S-2.015.

of a voter who does not execute his ballot properly. The only "standard" by which this is to be guided is found in section 101.5614, which provides that a "damaged or defective ballot" may not be discarded "if there is a clear indication of the intention of the voter as determined by the [county] canvassing board."[13] With nothing more than this vague concept to guide the counting, the court below would have a trial judge enlist hundreds of independent counters throughout the state to recount the votes. Yet, there will be no objective standards for these persons to apply during the counting process. The practical effect of the decision below will be that numerous teams of counters will exercise vast unchecked discretion to review improperly executed ballots, and will create *ad hoc* standards for judging those ballots.

Moreover, the partial nature of the recount forces the vote tabulation equipment to be used as, essentially, a screening device to find undervotes.[14] The equipment was not designed for this function. The type of counting the court below directed would require special software to be installed

13. The ballots that were ordered recounted are not damaged or defective. The failure to count these ballots stems from the failure of voters to execute the ballots as instructed, not from defects in the ballots themselves. Thus, the cited statute has no application to the ballots at issue. *Harris II* at 52 (Wells, C.J. dissenting).

14. This partial counting approach results in a different counting method applying to 64 predominantly Republican counties vis a vis the heavily populated and overwhelmingly Democratic Broward and Palm Beach Counties, which underwent *full* manual recounts. It also creates voter differentiation within Florida's largest county, Miami-Dade, where 139 heavily Democratic precincts underwent full manual recounts while the remaining 635 largely Republican precincts were to only have manual recounts of undervotes.

in the tabulation machines. Because of the short time frame involved, there would be no time for the machines and their software to be evaluated for accuracy by the Division of Election as required by section 101.015 and its implementing regulations. Thus, if the decision below were to stand, the voting machines would be used for a purpose that has no basis in the legislative scheme and the resulting recount would be of questionable accuracy as it is impossible to know whether the machines would be accurate in their selection of undervotes for counting.

In his dissent below, Chief Justice Wells correctly recognized that (i) section 101.5614, the statute cited as the appropriate "standard" for manual recounts, was never intended by the Florida legislature to apply to a recount of improperly executed ballots intended to correct for voter error and (ii) the lack of any objective criteria by which to conduct the recount raises serious federal concerns:

> The majority quotes section 101.5614(5) for the proposition of settling how a county canvassing board should count a vote. The majority states that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." § 101.5614(5), Fla. Stat. (2000). Section 101.5614(5), however, is a statute that authorizes the creation of a duplicate ballot where a "ballot card . . . is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment." There is no basis in this record that suggests that the approximately 9000 ballots from Miami-Dade County were damaged or defective.

> Laying aside this problem and assuming the majority is correct that section 101.5614(5) correctly annunciates the standard by which a county canvassing board should judge a questionable ballot, section 101.5614(5) utterly fails to provide any meaningful standard. There is no doubt that every vote should be counted where there is a "clear indication of the intent of the voter." The problem is how a county canvassing board translates that directive to these punch cards. Should a county canvassing board count or not count a "dimpled chad" where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.

Harris II at 51-52 (Wells, C.J. dissenting).

C. The *Harris II* Decision Further Modifies the Legislative Scheme Meant to Ensure Timely Election Results.

The *Harris II* decision has further modified the statutory election certification scheme. The Florida Supreme Court expanded the extension on the seven-day statutory deadline imposed by sections 102.111 and 102.112, Florida Statutes, that it had granted in *Harris I.* Though the Florida Supreme Court held in *Harris I* that the seven-day deadline should be

extended to 19 days in Presidential elections (and presumably longer in local elections), the *Harris II* court held that results received after the statutory and *Harris I* deadline had to be included in the Election Canvassing Commission's certification. The ramifications of this continuing duty to re-certify election results is directly counter to section 102.111, Florida Statutes,[15] and the legislative desire to ensure a timely resolution of election disputes.

Additionally, the *Harris II* decision modified the then existing rule in Florida that county canvassing boards are responsible for determining the number of votes cast for each candidate, Fla. Stat. § 102.141 (2000), and once a canvassing board certifies results, those results are presumed to be correct. *See, e.g.*, *Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1976) ("[E]lected officials are presumed to perform their duties in a proper and lawful manner . . . . [Accordingly] returns certified by election officials are presumed to be correct.").

D. The Proceedings On Remand Demonstrate the Serious Flaws in *Harris II*'s Demands.

The most cursory review of the proceedings in the Leon County Circuit Court that followed the remand in *Harris II* (Harris App. A), demonstrate the number of changes in the law, lack of standards, and deviations from Florida law in existence on November 7, 2000. Despite extensive objections by both the Secretary and the co-respondents, as well as the Bush petitioners, the Circuit Judge was unable to do more than simply follow the Florida Supreme Court's directions.

15. That section reads, in pertinent part, that "[i]f the county returns are not received by 5 p.m. of the seventh day following the election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified." Fla. Stat. § 102.111 (2000).

(Harris App. B). Thus, with just hours' notice, more than 60 canvassing boards were assembled and instructed to begin counting only ballots with undervotes for President, with some counties having manually counted all votes, some counties having manually counted some votes, and some counties having manually counted no-votes. In addition, no counts were made of all of the votes, nor were counts made of over-votes. *Harris II* ordered the inclusion of partial returns from some counties, as well as some returns, like Palm Beach County's that had never been certified at all, as well as ordering Miami-Dade County votes to be "counted" in Leon County by the Supervisor of Elections or such other personnel ordered by the circuit judge. Unable to allow legal arguments and challenges because of time constraints, the circuit court allowed the filing of written objections to the proceedings. (Respondents' 31 objections are set forth in Harris App. C).

In short, until the entry of this Court's stay of Saturday, December 9, everybody was counting everywhere, under whatever standards they established, without regard to any statutorily-defined criteria.

IV. Conclusion

The Gore Respondents will argue that the decision below is garden-variety statutory construction. The order below, though couched in terms of statutory construction, is actually a significant departure from the pre-election legislative scheme. When "judicial construction of a statute is unexpected and indefensible by reference to the law which had been expressed," it constitutes a change in the law. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). The changes outlined above have no basis in the legislative enactments and constitute such a change.

Respectfully submitted,

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APPENDIX

APPENDIX A — TRANSCRIPT OF MOTIONS HEARING OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA DATED DECEMBER 9, 2000

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA.

CASE NO. 00-2808

ALBERT GORE, JR., et al.,

Plaintiffs,

vs.

KATHERINE HARRIS, as Secretary of State,
STATE OF FLORIDA, et al.,

Defendants.

IN RE: Motions Hearing

BEFORE: HONORABLE TERRY LEWIS
Circuit Court Judge

DATE: Friday, December 9, 2000

TIME: Commenced: 8:35 p.m.
Concluded: 11:39 p.m.

LOCATION: Leon County Courthouse
Courtroom 3D
Tallahassee, Florida

Appendix A

REPORTED BY: B. J. QUINN, RPR, CMR, CP
Certified Realtime Reporter
Notary Public in and for the
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* * * * *

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[5] PROCEEDINGS

(REPORTING STARTED AFTER HEARING COMMENCED.)

THE COURT: What's your Plan B?

MR. BECK: I think it would be good to reflect this over the evening, because I know you're going to need a Plan B, and I don't think you need to decide that tonight.

What you need to decide tonight, is that people in the counties shouldn't be segregated in the ballots, in the way that makes our life more difficult.

Appendix A

In terms of what needs to be counted, we think that, first of all, the Supreme Court opinion sometimes talks about undervotes.

And by our count, through — in the most recent machine run statewide, there are 64,780 undervotes.

Those are votes, those are ballots, where nobody punched through the chad for any presidential candidate. The Supreme Court elsewhere talks about counting all the nonvotes.

The nonvotes is a broader category. That also includes the ballots where people punched through for two candidates. There's 175,660 of those nonvotes. So we have to sort that through.

We think, also, that it is —

THE COURT: What does the Supreme Court say that I should do about nonvotes?

[6] MR. BECK: I haven't been able to figure that out, frankly, Your Honor. I just know they refer to nonvotes on page 39. And nonvotes, to those who sat through the trial, is a broader category. And those may have to be examined, as well, to see if you can discern voter intent from the nonvotes.

There are also, we have said in this litigation, if you're going to start counting dimples as votes, then perhaps you need to look at all the ballots, because if somebody punched through successfully for George Bush, but then dimpled one for Al Gore, then if that dimple counts as a vote on the other ballots,

it ought to count as a vote on all the other ballots, and that would create an overvote situation. So there's that problem, as well.

But focusing now on the undervotes, we think that you need to look at all of the undervotes in Miami-Dade County, including the 20 percent that were already looked at by the Canvassing Board. And the reason for that, Your Honor, is that it now becomes a judicial function to make sure that they are all treated under the same standard using the same factors.

We have a real serious problem in Miami-Dade County, where we had a Canvassing Board that applied a very, very loose approach of divining voter intent.

And they only went through 20 percent of the precincts, [7] and the 20 percent of the precincts happened to be overwhelmingly Democratic. That's just the sequence they did them in. Now, and they came up with a number of votes that they divined, and Al he Gore picked up a whole bunch of votes.

And, now, unless Your Honor looks at that, again, we're going to start looking at the other 80 percent. And someone is going to be using a different approach that was used for the 20 percent that's heavily Democratic.

The remaining 80 percent, according to the regular votes that came in was actually 52 percent Bush, 48 percent Gore.

So if someone was going to use a real meaningful standard for the Republican parts of that county, then those voters,

including a lot of Hispanic voters, who tended to vote Republican in this last election, are going to have their votes evaluated under a standard that's different than was used for the Democrats.

That creates big problems under the Voting Rights Act for a protected group, like Hispanic Americans, the equal protection clause for everybody, as well as 3 US Code Section (5).

So we believe that the Court is required to include that 20 percent of the Miami votes so that all the votes are counted in the same way.

We also believe that Broward, which underwent a manual [8] recount, those votes also need to be examined by whoever the Court determines should do the examining, using the factors that the Court identifies as appropriate.

What we had in Broward was testimony in this record that they used different standards at different times during the manual counts, and that the standards were much, much looser than, say, the ones that were attempted to be applied in Palm Beach.

So Broward was a very heavily Democratic county, voted heavily for Al Gore. It picks up hundreds of votes in this process in the Canvassing Board, and uses a standard that was not used in Palm Beach, which I believe is not going to be the one that Your Honor sets for the rest of the state.

So we think that the Broward votes have to be reevaluated, using the same factors that Your Honor, we think, will have

to be identifying for the rest of the state. Otherwise we've got the same problems identified before. Different people's votes are treated differently, depending on where they live. And whether their Canvassing Board is all Democrats or has a mix.

So it's my big concern about consistent standards. And then, also, Judge, less controversially, I believe, we got a ruling today from Pensacola concerning Overseas ballots, the Military ballots, that the Democrats had initially succeeded in including. And now the Overseas and Military people [9] should have their votes counted even though they don't have a postmark on the ballot. We'll be giving Your Honor a copy of the opinion.

I haven't seen it, yet, but I understand it was favorable to the overseas voters. So those votes will have to be included in the tally, as well.

We believe that as to where it should be counted, consistent with our position, that the Court should be doing the counting, or at least under the direct supervision of Your Honor, if you're going to use personnel here, that the votes ought to be shipped up here.

We also believe, lastly, on the procedures that, the counting ought to be done in the Sunshine, with observers from each side present. These are going to be factual determinations that are going to be made by somebody under the auspices of the Court. And there are go to be disputes like there were in front of the Canvassing Boards, over whether this stray mark is a vote for Al Gore, or whether it isn't a vote for Al

Gore, and we're going to have to be heard on that. So we're going to have to have some mechanism, where we can have observers present, both sides, obviously.

And we believe that, under Florida law, since this is, essentially, a taking of evidence and an examination of evidence in Court, that needs to be done in the Sunshine.

Now, Your Honor —

[10] THE COURT: Tell me some specifics on that. How many people? What would they do?

MR. BECK: I guess, Your Honor, I don't know, yet, what Your Honor is going to order in terms of who is going to be counting these votes. But I think we basically need to have, for each person or group of people who are counting a set of ballots.

I think we need one observer from each side, who has the opportunity to be heard. And we need this transcribed so that, ballot by ballot, if there are disputes, those can be resolved.

It may be that Your Honor, takes an approach of allowing others to do the first cut. And then disputed ballots, you'll examine yourself.

But if you're going to do that, I think we're going to need a record so that Your Honor can name this evaluation. And even if Your Honor, decides: I'm not going to look at any ballots, we still need a record, because we're still entitled to appeal.

And I don't think that the Supreme Court created a whole new mechanism where not only do we have new people doing a manual recount, but it's conclusive that we're not allowed, even though it's done in the course of a lawsuit, to ever have an appeal or that.

So we're going to need to have court reporters [11] transcribing objections and arguments and records being kept, of which ballots are in dispute. So you can resolved that, or some other judge, or some other Court, can resolve it.

On the question of standards, Your Honor, I guess what I'll do, since I don't know exactly how comprehensive Your Honor's order is going to be tonight I'd like to give you a preview of what our position is, with the caveat that, since we didn't know Judge Sauls was going to be recusing himself, I didn't come ready with a two-hour evidentiary presentation. But let me tell you what I think the evidence showed in this case concerning standards.

THE COURT: I want to hear from Mr. Douglass and you. And it's ten of nine. And I may want to come back and hear some evidence on it, but, really, based upon what you heard, and the evidence, what criteria should be applied, in your mind?

MR. BECK: That's what I'll say, without getting into the evidentiary discussion. I apologize, but we have to say that, both from a legal point of view as well as a factual point of view, we think the criteria are: If you successfully punch the chad through all the way, or if you dislodge the chad partially.

So that it's what is so-called a hanging chad. I trust Your Honor has sort of seen enough in the newspapers to know what a hanging chad is.

THE COURT: Yes, sir.

[12] MR. BECK: But that is a fair indication of voter intent. We think the standard ought to be that a dimple or indentation is not something from which you can discern voter intent. Now, Judge, I want to go to the next step, to Plan B.

If Your Honor decides that you're going to articulate a standard, whether people are going to take into account dimples and indentations, here is what I think the factors are: Number one, the indentation has to come in a stylus, not from a fingernail or a finger.

And believe it or not, we had evidence, Your Honor, you can tell when it comes from a stylus, and when it's just other some stray marking. When it comes from a stylus, it leaves, basically a fingerprint of a stylus. There will be a circular dimple that is the same diameter of the stylus, and you can tell.

So, number one, the only dimples that ought to even be considered, is if they come from a stylus.

Number two is, the stray or so-called rogue dimple; that is, where there's a dimple next to George Bush's name, or Al Gore's name, but the voter managed to successfully vote in the rest of the races, that that is not an indication of voter intent. And it is, in fact, at least as consistent and more

consistent with the hypothesis that the voter chose to affirmatively not to vote for Al Gore or George Bush.

[13] We only heard from one voter. He put his stylus in, he thought about it, searched his soul and brought it out. So that's a man who chose not to vote. If you count that as a vote, you disenfranchise that man.

He's got a right not to vote for either one, we all love our candidates. But I read in the paper there are a lot of people who are not as crazy about either one of them, so they chose not to vote.

So a stray or rogue dimple is not a vote. And that simply is pretty consistently the rule throughout the country. And I hope tomorrow to have an opportunity to present you with the law, as well as the facts on this.

Now, we also did hear evidence from our expert, as well as theirs that, occasionally what happens is people don't insert the ballot in what's called a throat. Instead they put it on top of the device, and then they are never able to punch the chads through.

But both experts said, in that event, you'll see a pattern of dimpled chads. Because there's nothing magic about Al Gore, all the way down the ballot they will have failed to punch the chad through, or in almost all of the races.

So we believe that if you're going to be looking at dimples, which you should not do, that you should only count the dimples where there is a pattern of clear attempts, but [14] failures to punch the chad through.

That is the kind of standard that was attempted to be applied in Palm Beach County to varying degrees of success at different times. It's the kind of standard that was applied in the Illinois case, and in the Pullen case, and it's also the kind of standard embodied in some regulations from around the country.

We think dimples shouldn't count. But if you're going to count them, that's a fair indication of voter intent, that the rogue dimples ought not to be counted.

And one thing we feel very strongly about, Your Honor, what happened in Broward County was just awful. They said: This person voted for a whole bunch of Democrats; and, therefore, I can read his mind and tell that indentation next to "Al Gore" was really a vote for Al Gore.

We feel like trying to read his mind based on what he did in other races is really improper. Because at the presidential race, in particular, people decide not to vote for the head of the ticket or they switch parties, or cross other parties, because they often vote for the man, and the future of the woman, rather than the party. And they have second thoughts, and they often say: I'm a loyal Democrat, but I can't stomach Al Gore. Or, I'm a local Republican, but don't like George Bush. But when you describe intent based on what they did in other races, you disenfranchise those [15] people and water down all the votes of other people in Florida.

So that's my shorthand version of what we think the factors would be. And we hope Your Honor would give us an opportunity to summarize the evidence on it, because there was quite a lot of evidence in the trial record on this.

THE COURT: When do you envision in your procedure that actual counts would begin?

MR. BECK: Well, I think that they ought to begin -- I assume Your Honor wants to move forward expeditiously and not on a leisurely basis. So I think people ought to be working on the weekends here, and I think that the counties ought to be reporting to the Court on their success in segregating the undervotes, and ought to be reporting to the Court the numbers, so that we have it in the record here of the new tabulation, whatever this may be used for in the future, of Gore votes, Bush votes, all the other candidates, and the number of undervotes.

And then once those are segregated, you know, when it should begin, I'm assuming Your Honor is not going to take me up on my suggestion that they all get shipped down to your courtroom and you look at them all.

So I think, then, we're talking about, you know, the day after that.

But I don't know who Your Honor is going to decide [16] should look at these votes.

THE COURT: Whoever, that is.

MR. BECK: Whoever looks at them, I think ought to be looking at them. Basically, as soon as the Court is satisfied they've segregated these in a proper way and recorded the tabulations in a proper way, and as soon as we can get a court reporter and observers from either side there.

So I'm anticipating that some counties may be able to do that process, and conceivably start, you know, tomorrow afternoon. I don't know if they can get it done that fast or not.

We also have a whole issue of — I think the Supreme Court ordered that every county, including the ones that use optical scanners, have to go through this process:

And I'll tell you, I haven't given a moment's thought to what an undervote is, what the implication is in an optical scanning county.

We need to talk to the Court about that. There are some counties with very view undervotes. And it may be an easier task. So the short answer is: As soon as Your Honor has been satisfied that they've been properly segregated and tabulated, and we can get observers there, then I think the counting would begin.

Now, let me also say that we actually intend to seek a [17] stay of this entire matter from the Florida Supreme Court and the United States Supreme Court, because I think that it can't possibly result in anything that's actually meaningful and helpful. And all it's go to do is create constitutional difficulty.

So, but in the meantime, we want to be cooperative with the Supreme Court. So that's what I think ought to be done.

We're just now thinking about who are we going to draft to be observers. I don't know whether it's true. My wife told

me that she was watching television before I came over here, and that she heard that the Democrats had chartered a plane and were flying in 100 lawyers from Washington to act as observers.

So I suppose we'll have to round up volunteers on our side. I don't have a toll free number to call. But we're going to have to get volunteers on our side, as well, lawyers who are going to be with each one of these counters, lodging objections and making arguments.

THE COURT: Anything else?

MR. BECK: No, Your Honor.

MR. KLOCK: Your Honor, we have objections to what the Republicans are suggesting.

THE COURT: The Republicans are suggesting — I'd like the objections, but I'd rather focus on the positive. You tell me what you want to do.

[18] MR. KLOCK: If I can explain why. I don't mean to be mean or problematical. But you have the desirable position of not only reporting to the Supreme Court of Florida, but also having the Eleventh Circuit Court of Appeals and the United States Supreme Court watching what is going on, having orders simultaneously filed in Washington and Atlanta.

Our concern is to preserve the record for a review before the Eleventh Circuit Court of Appeals and also the United States Supreme Court.

And, Your Honor, I'll understand if you don't want to hear it, and we'll just file it in writing. But one thing I'd like to start out with that's problematical, if you turn to page 38 of the slip of the Supreme Court, they say: "Moreover, because the venue of an election contest that covers more than county, lies in Leon County, the Circuit Court has jurisdiction, as part of the relief it ordered," presumably, "to order the Supervisor of Elections and the Canvassing Boards, as well as the other necessary public officials in all counties that have not conducted a manual recount or tabulation of the undervotes in this election, to do so forthwith. Said tabulation is to take place in the individual counties where the ballots are located." That's what they ordered you to do.

You'll recall the argument put forth before that indicated that the only provision for a manual recount [19] provides for three people that are designated by office. And, Your Honor, the identity of those people are very important, because, for instance, in Dade County, the supervisor of elections, who is one of the three, is a registered Independent.

If you look down here further, after the Supreme Court has said that you're supposed to do it in the county where the votes were cast, they then go on, on page 39, to suggest that, because time is of the essence, the Circuit Court with respect to the Miami-Dade ballots is to go forward and be assisted by the Leon County Supervisor of Elections, or its sworn designees, directly contradictory to the paragraph before. And it's my understanding — I've never met the man — that he is an elected official who ran as a Democrat.

Now, Your Honor, if you look at the transcript when you have the opportunity to look through, you'll find that the

number of votes that are generated through this divining process seems to be tied not only to the number of registered voters of each party in the county, but also who is looking at it.

So our view would be, and we would reiterate and respectfully disagree with our colleagues that are representing the Republicans, that it must be done by the Canvassing Boards, the standards have to be established by the Canvassing Boards there.

[20] And if the Court is going to overlook that, that's fine. But it can't be done the way that it's being suggested that it be done. That would be improper with the statutes. Now, we have a number of objections I'd be happy to go into, but —

THE COURT: The positive thing that you suggest I do is have the Canvassing Boards in the county do the manual recount?

MR. KLOCK: Yes, Your Honor.

THE COURT: Okay.

MR. KLOCK: And then, Your Honor, also with respect to, you know, certain other points that we can raise, we can do it now or later. But the Secretary — the Division of Elections has issued two advisories to the supervisors. And I'll pass one up to the Court, if I may, and pass one around here, with the Court's approval.

And, Your Honor, what our hope is, is we have advised the supervisor of elections they should watch TV so if there is

anything that is ordered from the bench, that it can be immediately implemented.

But, Your Honor there is going to have to be a need to deal with those issues. I assume these people are going to comply without being served. But you never know. And that's something that the Court has to consider, as well.

Another point the Court has to consider is that, you [21] know, this process has now extended — the protest/contest period, which apparently ran together — for a longer period of time. And when, Judge, is to be the appellate review of this process if everything has to be done by midnight on the 12th?

So Your Honor also has to give some thought to a cutoff point. And as has been argued before also under the statutes, if you don't have a complete count done, it is not fair to include them.

And, Your Honor, I would, again, refer black to the testimony that was taken at the trial, where they demonstrated in Miami-Dade County, where the numbering of the precincts starts with one, not surprisingly, starts over by the coast, that heavily Democratic precincts with over an 80 percent Democratic content were counted in the first 135 that they did where they stopped, and then the rest of the county went 53 percent, as opposed to a higher number, I believe 53 percent for Governor Bush.

So, consequently, if you don't do the entire county, again, you're skewing the votes. So you do have to respectfully

figure out a way to have all of these people in all of these counties get everything done. So it's either everything or nothing. And we'd also suggest that the whole state has to be done, or they can't be permitted. There is a statutory provision that says you can't have partial [22] recounts.

THE COURT: When you say, "all the votes," are you talking about all of the votes, or all of the undervotes?

MR. KLOCK: Our position is all of the votes, that's plan A, which Your Honor has indicated you don't have a great deal of affection for.

THE COURT: Plan A was that I personally look at everything.

MR. KLOCK: This was a modified plan A. This is more attractive. But the fact is, again, all the votes have to be looked at, because the overvotes are just as significant as the undervotes, because as you go through the process, if the chads flip this way, they can flip that way.

THE COURT: I'm going by a very narrow thing, and what the Supreme Court told me to do is what would be done.

MR. KLOCK: I'll be happy to put all of our objections in writing, I just don't want the Court to claim its sandbagged later on if these objections are raised.

Finally, with respect to the standard, with respect to what Mr. Beck raised, the only testimony — they had an expert that the Democrats put on. He was asked the following

several questions. He was asked: If you pick up a ballot and you go to the presidential race, and you see a hole punched through all the way, and you see a dimple below it, and another candidate, how do you read that? And he said, [23] well, there's no question. The dimple is a mistake, and the punch-through is correct.

The next question: Well, if you pick up a ballot, and there is only a dimple, and he said: Well, if it's only a dimple, you count that as a vote.

Now, how Your Honor, something that is a mistake in one instance, then becomes not a mistake in another instance, I think points to the fact that anything having to do with a dimple should be immediately suspect, especially since we don't have any standards.

And I don't understand how you can have a standard if something is or is not a mistake or a vote, depending on what you want to do, which gets us back, again, Your Honor, to the Canvassing Boards that have to make these determinations. I guess with some sort of Court supervision.

And if Your Honor wants, we'll put other objections into writing and file them in the morning. We want them in the record, and we want Your Honor to be able to look at them.

And, in addition, I would ask, with respect to what one of the appellate courts is looking at, that is the Eleventh Circuit Court of Appeals, we want to pass up a copy of the Touchtone decision, and its dissent. And particularly call Your Honor's attention to the dissent of Judge Cholak (phonetic) for Your Honor to look at.

[24] I had asked for copies of each of the opinions to be brought over, and, apparently they brought over twice as many of one.

I'll also hand up the Seagull opinion. And the other objections, we'll file in writing.

THE COURT: And I appreciate that many of you may have objections to what needs to be done. My only concern is I'm going to try to do what's been directed. I fully expect you to make your objections on the record.

But if we have to of the this done, what's the best way to do it?

Finally, also, I was just handed this. This is an order of the United States District Judge for the Northern District of Florida which commands that Military ballots that are, as the language says — if I can read this from the ordering clause: "Accordingly the Court hereby orders any state statute, regulation administrative rule, or procedure, that rejects a federal write-in ballot which has been signed pursuant to the oath provided therein, (a), solely because the ballot envelope does not have an APO, FPO or foreign, postmark; or, (b), solely because there was no need for an application for a state absentee ballot, conflicts with federal law. It is further ordered that all federal write-in ballots objected to for the above-stated reasons, are declared valid, this 8th day of December, 2000, by Judge [25] Leahy Collier (phonetic), United States District Court, which, of course, is binding upon the Secretary of the Canvassing Commission. So we'll be in that process, as well, Your Honor.

MR. BECK: Your Honor, there were a couple of points that I either didn't make, or didn't make clear, but I'll at least make them short.

The first one is that on the question of whether there was a statewide standard as to not counting dimples and indentations, there was, we believe, a statewide standard in practice, in effect, which was to count, fully dislodged chads, only, and that the Palm Beach regulation was a recognition of that.

It's not so much that the Palm Beach regulation governs statewide, but it is a reflection of the fact that, statewide, that was the practice and standard.

So if this Court now articulates a standard that allows dimples and indentations to be counted, that will be a new and different approach and standard than was in place in the Court — in the state, although not written up in the state regulations; and, therefore, would violate 3 US Code Section 5.

THE COURT: When you say at statewide standard, where did it come from?

MR. BECK: I think where it came from is probably the [26] instructions that came with the machine, and the instructions that came from the manufacturer, and that the way that votes are tallied, using the Votomatic machine is that somebody dislodges the chad fully, then the light shines through and it counts as a vote for Al Gore or for George Bush.

And no one has ever, previous to this in Florida, counted ballots any other way. No one had ever, previous to this,

using Votomatic ballots, ever used the standard of indentations or anything else. So it was a machine count of the ballots with fully dislodged chads. And to do something other than that is a new and different standard, is your our position on that.

Secondly Your Honor —

THE COURT: It's sort of like a common usage, or common practice, as opposed to some standard proposed?

MR. BECK: It was not a legislatively — it was not written in the statute, but it was — when the officials who determined how votes were to be counted and tabulated brought the Votomatic machines, and followed the instructions from the Votomatic manufacturer, and put the instructions on the back of the voting booth, telling the voters what counts as a vote, and having the instructions in the ballots.

And what the instructions in the ballots say, and on the back of the voting booth say, is that in order to vote, you must fully dislodge the chad.

[27] And it says that, if I haven't fully dislodged the chad you have to pull it off. So there, in fact, were written standards in the form of the instructions that were at the polling place on the wall, and in the back of the booth. We saw it on television. I don't know if you were paying attention to that part of the testimony.

And is written on the ballots, themselves. So the voters are instructed in language adopted by all the local officials across the state who use these machines.

So the standard is in writing, adopted by the local boards and given to the voters. So we do believe we have written standards that say: To vote, you dislodge the chad completely, otherwise it's not going to count as a vote.

So now to change that, we think would be a change in the law and, in effect, in the written standards, which would violate the federal statutes.

And we can elaborate on that tomorrow, if you want.

Then lastly, Judge, whatever procedure you adopt, and whomever you delegate the task to of reviewing the ballots, in the first instance, we think that for all challenged ballots, those should be segregated further, identified by number in some way, a record kept of the objections, and the arguments made, and those should come to Your Honor from around the state.

I don't know how many there's going to be, but they — [28] I think if the standards are articulated clearly enough, I don't think there's going to be very many nonvotes that are transformed into votes. If, in fact, the factors are identified correctly, there's very few people who put the ballot on top of the machine and leave a pattern, because they don't follow the instructions.

So it's not going to be that big an issue, I don't think, if the factors are clearly articulated.

But whatever they are, we think that disputes need to be resolved, in the last analysis, by this Court, rather than by

your — whoever you delegate the initial counting to, because the Canvassing Boards are not given any discretion in the contest. They're not mentioned in the contest.

And if the Supreme Court has decided to order, or to suggest to Your Honor that you can enlist their aid, we think that's a mistake. We think it creates horrible constitutional problems. But if you go down that road, then at the very least, there has to be some judicial review of these determinations that are being made by nonjudicial officers.

So we hope all of the challenged ballots will be bundled up, segregated, brought here to Tallahassee, and then we can have a hearing and go through them.

THE COURT: Mr. Myers? I'll give everybody a chance.

MR. MYERS: May it please the Court, as you may not be [29] aware, I represented West Florida Intervenors in this action. Early on in this litigation we had asked the Court to do a statewide manual recount and asked the Court to take a statewide perspective.

If the Court looks at page 38 of the Florida Supreme Court's decision, you'll see the Florida Supreme Court has agreed with the Intervenor's position that a statewide count should been done. So presumably they agreed with some of the positions we presented.

I wanted to answer Your Honor's question about votes that are no votes, or not undervotes, in other words, the overvotes, and perhaps the Military ballots, or any other absentee ballots.

Appendix A

I took some time to look through the Florida Supreme Court's order, Your Honor, to determine whether you should be ordering a recount of those.

If the Court looks at page 39, you'll see that the Florida Supreme Court has directed you to enter such orders as are necessary to add any legal votes to the total statewide certifications, any legal votes, Your Honor.

And if you look back, you'll see on page 16 of that decision that the Florida Supreme Court also agreed, it says, "We do agree that a manual recount be conducted for all legal votes in this state."

Furthermore, the Court further discusses the need for [30] looking at all legal votes in the State so that every vote that should have been counted is counted for purposes of this manual recount.

On page 11, the Court goes on to say, about halfway through the page, Your Honor: "The right to a correct count" —

THE COURT: What page?

MR. MYERS: Page 11, it's a quotation, as well established in this state by our contest statute. "The right to a correct count of the ballots in an election is a substantial right, which is the privilege of every candidate for office to insist on. In every case where there has been a failure to make a proper count, called tally, or return of the votes as required by law," and this fact has been duly established as the basis for granting such relief, a correct count of all the ballots, Your

Honor, is one of the things the Supreme Court has pointed out to you.

And if you look at page 19, about two-thirds of the way down, over toward the right, you'll see it says, "The clear message from this legislative policy is that every citizen's vote be counted whenever possible."

So I think it's clear, Your Honor, that from the Florida Supreme Court's decision today, that as a floor or a minimum threshold for Your Honor, you must order a recount all of the undervotes.

[31] However, the Court has broadly ordered you to include any legal vote that the Court feels would be there, and also to ensure that every legal vote be counted so that every citizen's vote would count in the State of Florida.

I think it's pretty clear that the Court has the authority to do that here, and that would include absentee ballots, and would exclude the overvotes or no votes that had been registered. I'll represent to the Court that —

THE COURT: Can I stop you for a second? Do you consider overvotes and no votes or nonvotes the same thing?

MR. MYERS: Not necessarily, no, I don't. A no vote would be, for example, the counties reported, and it's part of the record in this case, that the State Elections Commission received a report that there were over 180,000 no votes. And those no votes would include undervotes and overvotes. So the no votes is a more, a broader concept.

THE COURT: So no votes include both undervotes and overvotes?

MR. MYERS: From my understanding, yes, Your Honor. I also point out to the Court that we heard testimony from Judge Burton in this particular trial. We learned that there is now an art to manually recounting the votes. It was readily apparent that he had picked up this art from obviously spending hours and hours from looking at these ballots.

[32] I recommend to the Court that you, at least, at part of the hearing here look at some of the ballots by hand, so you can begin to understand some of the these that you would need to convey to the rest of the boards.

Also, Your Honor, if you would be so inclined to review the testimony of Judge Burton or others who actually went through a manual recount, you'll be able to pick up some of the standards that Mr. Beck was talking about earlier. So I recommend the Court do that.

Notice, you asked Mr. Beck about when and where. First of all, it's clear that the Florida Supreme Court intended that the votes be done in the counties in which they were cast, with the exception of those votes that are right here in Leon County.

We recommend to the Court that, at the earliest, the Court ordered the manual recounts to begin at noon tomorrow on Saturday. That would be sufficient notice for the public to go to the locations of the manual recounts so they could witness this, and also give sufficient time for the observers

who want to be there, to be at the various locations throughout the state.

Any earlier than that, Your Honor, would deprive the public of proper notice to watch this proceeding.

I also recommend to the Court that you have a time certain for reporting the results of these manual recounts so [33] that we can meet our — the deadline that we have on December 12th. I would recommend that noon on Monday the 11th, would be an appropriate time to stop the manual recount and report.

The reason I say that, Your Honor, is it will take time to tabulate the results. And the Court must also consider who do they report? To the Court? Well, who in the Court?

And they need to understand that, because the Court administrator may not be able to physically receive 67 faxes, or I guess it would be more like 63 faxes from the various counties at five o'clock on Monday afternoon, in order to begin tabulating results?

Then, of course, as Your Honor knows, once the counties report, there has to be a tabulation of the statewide count and there need to be time for that to be don. That's why I recommended noon on Monday, at the latest, so that these results can be done.

I also agree with the concept that you have to look at all of the votes, or at least run all of the votes through the machines, in order to identify the no votes that have to be looked at by hand.

Appendix A

I recognize that there's not enough time in the next two days count 6,000,000 votes in the State of Florida.

However, running those through the machines will eliminate the problems Mr. Beck identified, and that is every [34] time they're run through the machine, additional no votes are identified. So we have to make sure we get an accurate count. And that's of utmost importance to the voters in the State of Florida.

THE COURT: Let me ask you this: Every time you run it through the machine, you get a different count. Well, why would the count you do next time be any different than the one you already have?

MR. MYERS: The point is, if they have already run them through the machine and they already have their counts that they've certified — and they've done it twice, we know — then they may not be able to identify which of those votes had registered as no votes, without running them through the machine, again. If Your Honor orders them to only count the no votes, and they haven't segregated them, and we don't know that they have, then you have basically crippled that Canvassing Board from doing their job, and they're going to have a difficult time.

However, if you order every Canvassing Board to run them through, again, you ensure that everyone starts with the same ground zero approach, and that is that we make sure we separate the no votes away. And that way we're much more likely to have an accurate count come in from the Canvassing Boards once they report.

I also agree with Mr. Beck that you have to have [35] objective standards, Your Honor. And that's why I suggest you take a look at the votes. But Your Honor needs to tell statewide what those standards would be, so, again, the count is done with the same standard statewide.

And who will vote? I recommend to Your Honor that the people who vote are people who are experienced with handling these ballots.

Obviously, the Canvassing Boards are the best candidates; however, some of the Canvassing Boards will not have an opportunity to have just those three people that are members of the board do the count in some of the counties that have a large number.

So Your Honor has to consider how can they delegate to people that necessarily may not have any experience.

Let me give you an example: Let's say that Hillsborough County has to manually recount all of their undervotes this weekend. Well, up to now, to my knowledge, they've not had to do any manual recounts, so they haven't trained anybody up to now to know how to do a manual recount. And only the three members of the Canvassing Board are experienced with — and their staff — are experienced with handling the ballots themselves.

So the Court needs to give some direction to the Canvassing Boards, especially in the more populous counties, on how they are to delegate, if at all, to those members who would be [36] working for them, and what kind of training that

they need to give them, in order to have this manual recount done within the two-day time period.

And I suggest to Your Honor, by giving a time certain that they have to report the results, and telling them how they must report the results will, of course, help them establish how fast they have to go through this process, how many people that they will need, and how they would go about it to meet the deadline.

Now it, there are some concerns about how to ascertain the Palm Beach County undervotes and overvotes or no votes. And I'm not sure that that's been handled by the Palm Beach County personnel.

However, Your Honor has to address the fact that those ballots were all shipped up here from both Miami-Dade County and Palm Beach County, and that they went necessarily segregated.

As I recall during last week, they began to separate some of the ballots from each other, and they were ordered by Judge Sauls to stop the separation and just pack them all up and send them up here. And they were doing some sort of separation down in Miami-Dade County, as I recall, or maybe Palm Beach County.

So Your Honor has to get some instruction for the personnel here in Tallahassee, on how the votes have been packaged in Miami-Dade County and Palm Beach County so that the personnel [37] up here have to figure out how they're go to do it.

And let me point this out to Your Honor: I don't believe Leon County has the machines to run the Miami-Dade County and Palm Beach County ballots through the machines to separate them. So that's a concern, because I know when we vote, we use the optical scanners here in Leon County. If that's a concern, then the Court has to address that, as well, is how are we going to have a machine separate them when we don't have a machine here in Leon County that can actually run those ballots through. And that may be that we have to have someone from Palm Beach County or Miami-Dade County to fly a couple of machines up here first thing in the morning so the Court can have the no votes separated from the rest of the ballots, so they can get started on the manual recount.

So those are all the concerns that we have. And from the point of view of voters in west Florida, we just ask that you keep in mind that the voters are the real parties in interest here in this particular case, and that we're trying to be protect the will of all of the voters of the entire State of Florida in whatever standards you give everyone. Thank you.

THE COURT: Thank you.

MR. DOUGLASS: Your Honor, just a short remark. Number one, what I'd like to ask the Court to consider, is that when we have these types of presentations, that we impose some [38] time standard in the matter. In the Supreme Court, for example, you've got so much per side. And you had to divide it.

Consequently we didn't have these long speeches by Intervenors who were in here by virtue of being allowed to

come along as the Intervenors, and not to interfere in the suit.

But I would like to request that the Court consider, when we have these hearings, that we put a time line for that side and this side. Otherwise we — we're usually very short, anyway, and it seems like we're outweighed.

Certainly we're outweighed tonight at least starting out. Our position as stated in our motion, which will be explained by Mr. Boies, is succinctly stated by the Supreme Court, we think, which says, "Time is of the essence," Even in this hearing. The Circuit Court shall commence the tabulation of the Miami-Dade ballots immediately which they described above as the 9,000 undervotes which are segregated.

And the Circuit Court is authorized in accordance with the provisions of 168, which he will refer to, to be assisted by the Leon County Supervisor of Elections, or its sworn designee, which means you may employ others.

And, moreover, since time is of the essence, in any statewide relief, the Court must consider any further statewide relief that should be ordered simultaneously with [39] the Miami recount.

And so what we say, and Mr. Boies will answer some of the things, is that it should begin immediately, as we said, and go forth. And we had suggestions as how that would be done.

MR. BOIES: May it please the Court, my name is David Boies, and I begin by expressing my appreciation and I'm

sure all of the parties' appreciation for sitting this evening. This is something that is obviously very important to us to be expedited.

In terms of what we would like to see the Court do, basically, what we would like to see the Court do is what the Florida Supreme Court has set out in its opinion.

First, there are 9,000 Miami-Dade County ballots that have not been manually reviewed, and those are the ballots that the Florida Supreme Court says should be reviewed immediately here. And they have set out a procedure that they've authorized the Court to use, not instructed the Court to use, but authorized the Court to use, in terms of using the supervisor of elections and that person's sworn designees.

The second thing that we would like the Court to do is to commence the manual recount for counties, other than Miami-Dade County, that have not already had a manual recount.

[40] And I'm confronted a little bit with the Secretary of State saying that it must be done by the Canvassing Boards, and Governor Bush's lawyers saying: It can't be done by the Canvassing Boards.

We believe that the Supreme Court has said that it can be done by the Canvassing Boards. We believe it could also be done here in Leon County, using the Leon County Supervisor of Elections if the supervisor of elections had adequate resources to do that. We don't know whether that's so or not.

If there were adequate resources to do that, we would have no objection to Governor Bush's suggestion. And we believe that that would be entirely consistent with the Supreme Court's opinion; that is, we disagree with the Secretary of State that is somehow precluded. The Supreme Court's opinion, in other portions, makes clear this is a judicial function; that it is not a 166 protest. It is a 168 contest.

Not only the majority opinion, but two of the three dissenting Justices draw that distinction between 166 and 168, and make clear that 168 is a judicial proceeding, and not one where you have to give discretion to the Canvassing Boards.

So if there is adequate resources to do it here, we believe that that would be acceptable under the Supreme [41] Court's view. That's what Governor Bush's counsel has suggested, and we would be agreeable to that, too. Our only concern is whether or not there are adequate resources here to get it done in the time available.

Let me make one point that is a little bit, maybe, of an reargument of something the Supreme Court decided against us, but they've been rearguing a lot on what the Supreme Court decided against them.

THE COURT: Didn't they take my lead, though, when I told him about it?

MR. BOIES: I did, Your Honor. And I'll only mention this one thing, and that is — and I'll do it, in part, because the Intervenor suggested it, as well, and that is the 3,300 votes from Palm Beach. Those were ballots that the Supreme Court

said, we had not shown that the Palm Beach board didn't do those right. No one ever looked at those as a judicial matter.

And if we're going to go beyond the strictures of what the Supreme Court has laid down, we think the very first ballots — and this may have been what the Intervenor had in mind when he talked about the need to look at the Palm Beach ballots.

The first ballots that ought to be looked at are those 3,300 ballots that are already here.

But we don't want to do anything until after everything [42] that the Supreme Court has ordered to be done has been done.

Once that's done, maybe there's some things that they're suggesting that we could do. Maybe there's some things that we're suggesting that could be done. But I think the Supreme Court has made clear that there are certain limited things that have to be done immediately, and those are the things that we would ask the Court to focus on, at least first.

In terms of when, we think the Court meant immediately when it said, "Immediately."

Hours make a difference here. We would like to see the process with respect to the 9,000 Miami-Dade ballots start immediately. First thing tomorrow morning.

We would like to see the counties directed to start first thing tomorrow morning. If the counties are going to do it, or if it's going to be done here, that they be instructed first thing

tomorrow morning to get the ballots here so they could be done here.

We think that hours are going to make a difference here. And the Court knows, I think, may know, that Palm Beach was shut out of the certification process because it finished its manual recount 127 minutes late.

Minutes may make a difference here. So we don't want to have any delay.

Let me just talk, in response to some of the individual [43] points that were made.

First, there was a question of what undervote meant.

The Court, the Supreme Court does use the term undervote and nonvote or no vote. I think it is clear from the context that all of those words are being used in the same sense; that is, a ballot for which there was no vote recorded for the presidential race.

There are overvotes where there are two or more votes recorded for the presidential race.

That's not what the Supreme Court was talking about. And, indeed, when you look at the use of the word, nonvote, or no vote, the Supreme Court uses that in the context of the 9,000 Miami-Dade votes.

And there's no dispute that the 9,000 Miami-Dade votes are undervotes.

So we think that what is at issue here are undervotes.

If somebody wanted to look at overvotes at sometime if there was time, I'm not sure we would have an objection to that.

But what we absolutely would object to is anything to do with overvotes, or any other votes, until we get what the Florida Supreme Court has ordered to be done, which is a review of all the undervotes.

The number that was given to the Court of about 64,000 undervotes may be somewhat high, because I think that number [44] may include undervotes from Broward County and Palm Beach County, which, of course, are two of the three largest counties with undervotes.

And those votes have already been taken care of by the Supreme Court.

In terms of the criteria to be used, we think the Supreme Court's opinion is quite clear. They talk about the clear intent of the voter, and we believe, that's always been the appropriate standard in Florida. Judge Labarga in Palm Beach County, issued two opinions on that.

And those were opinions that we had thought previously from what the Defendants had said, were opinions that they agreed with.

Those opinions make clear that it is not a punch-through standard, it is not a hanging chad standard. It is the intent of the voter, looking at the entire ballot.

We think that if you look at the cases the Supreme Court cites in its opinion, in its opinion, the Florida Supreme Court

says, "There are a number of other states that follow the same principle," and they give three examples, Massachusetts, South Dakota, and Illinois.

And if you look at those three cases, and you look at what the Supreme Court of Florida says about those cases, I think you also get a sense of what the appropriate criteria is to use to identify the clear intent of the voter. For [45] example, the South Dakota case, the Duffy case that the Supreme Court cites in its opinion today, is a case that the Florida Supreme Court characterizes as holding that if you see a mark of some kind where a voter would ordinarily make a mark in order to vote, then, unless there's something that clearly indicates that that's not a vote, it should be considered a vote.

The Dellahunt case, which is a Massachusetts case that the Florida Supreme Court also cites in that same paragraph, is a case that holds that where you have an indentation on or near the chad, that should be counted as a vote.

The Pullen case, which is the third case, this is an Illinois case that the Court cites there, although it doesn't quote the Pullen case in this opinion, it did quote extensively from the Pullen case in its November 21 opinion, also talks about looking for what the reasonable interpretation of what the voter's intent was from the entire ballot.

So I think that the Supreme Court has made it clear, not only what the standard is, but what, if you need to be specific about particular criteria, what those criteria are.

So we think that that is something that does not need to delay the process.

We don't have an objection to them presenting to the Court summaries of evidence. We can present summaries of [46] evidence, too. It will not surprise the Court that there are some pieces of evidence that Mr. Beck did not mention that we think are important for the Court to consider.

But fundamentally, the Supreme Court of Florida has decided these questions. It has decided that there is go to be a manual recount. It has decided that that is not going to include all of the 6,000,000 ballots. It's only going to include the undervotes.

It's decided that those counts need to start now. It's decided that those are going to be done as a judicial matter, except to the extent that there are ballots in other counties that can be done there, or can be done here.

So I guess the bottom line, because we think the opinion is pretty clear, and we just think that it needs to be implemented as quickly as the Court is prepared to do that.

THE COURT: Well, in terms of who is going to do it, you say you don't care whether it's done by somebody up here, or the Canvassing Board, or the supervisor of elections down in the counties?

MR. BOIES: That's true, Your Honor. The only qualification is if, in consultation with the Supervisor of Elections of Leon County, the Court were to conclude that the resources here were not sufficient to do it, or it would — I don't think this could possibly be the case, but if for some [47] reason we couldn't get the ballots up here; that is, if there was any

practical consideration that meant that bringing the ballots here would make it unlikely that we were going to get it done, then we would say: Get it done in the counties.

And I think that's what was motivating the Florida Supreme Court. I don't think the Florida Supreme Court was saying: If has to be done in the counties, because elsewhere in the opinion, they make clear this is a question for judicial resolution.

But if we could get them here and get them done here on time — and I think the number is such that you probably could, because I think the 54,000 number is too high. And if the number were closer to 40,000, which is what I think it is, I think that is something that could be done in a period of time, if you had enough teams.

I guess the only other thing I would say is obviously, we don't have any objection to having observers. In the Supreme Court's Bechstrom's case, what happened there was that the Circuit Court had the Clerk of the Court review the ballots with a representative of each side present.

THE COURT: Clerk of the Court?

MR. BOIES: In that case, that was the Clerk of the Court. That was the 1998 Bechstrom court case.

THE COURT: Two observers?

MR. BOIES: One observer from each side watching it. [48] The only thing that we would ask is that the process not get

booked down. The Court is well aware, with lawyers, you can make every ballot a federal case, to coin a phrase.

And I think that there are enough federal cases already in this matter. And what we need to do is we need to get on with the counting process.

All we really want is for the count to start soon, and to progress, so that we can fulfill what the Supreme Court has said, which is to get it done on time.

We think that if the counting is going to go down in some of the counties, they need to report by tomorrow at the end of the day, what their schedule is for completion, and how much they've gotten done. Many counties ought to be finished tomorrow. And we think that the Court can't wait until Monday to get reports.

I think the Court is going to have get reports on a daily basis to make sure there is not some problem that we don't know about that is too late, and we can't solve it.

MR. KLOCK: Your Honor, if I can address a couple points, very quickly. First, Palm Beach County, Mr. Boies referred to as being 127 minutes late. Currently they are 17,500 minutes late because they still have not filed a certificate indicating what the additional votes are that were due at five o'clock on the 26th.

The next point, Your Honor, is for those of us that are [49] local lawyers, generally speaking the stuff that is closer to the end of the order is more significant. And I would suggest

that while Mr. Boies thinks the Supreme Court is sort of suggesting you can do it any way you want, I would refer you to the language at the bottom of 38: "Moreover because the venue of an action of an election contest covers more than one county than Leon County, the Circuit Court has jurisdiction to order the supervisor of elections and the Canvassing Boards, as well as the necessary public officials in all counties that have not conducted a manual recount or tabulation of the undervotes in this election, to do so forthwith. Said tabulation can take place in the individual counties where the ballots are located. That is nine lines before the "so ordered" language.

In addition to that, Mr. Boies has excellent recall. He indicated to Your Honor, he says, "Because time is of the essence, the Circuit Court, shall commence the tabulation of the Miami-Dade ballots immediately. But if you move on another sentence or two, it says, moveover, since time is also of the essence in any statewide relief, the Circuit Court must consider any statewide relief should also be ordered forthwith and simultaneously with the manual tabulation of the Miami-Dade votes.

Two other points, Your Honor, the Florida Supreme Court, in the last paragraph says that that is defined under [50] 101.561(5) of the Florida Statutes.

And when you compare it to the opinion, a legal vote as it is used there, is one that is decided by the Canvassing Board.

So the little adjustment to the Supreme Court's decision, is to go in and have the Court reexamine the 3,300 votes that

were determined as illegal votes by the Palm Beach County Canvassing Board, and recognizes at the beginning of the Supreme Court's opinion, they are illegal votes forever, Your Honor. So they can never be recounted.

And I think the only other point I wanted to mention is with respect to overvotes and undervotes, you also have the problem when you get into the optical scanning votes, Your Honor. You simply can't do what they want to do with the undervotes, because, Your Honor, when you get to the optical scanning, sometimes what folks do is put an X in the box, instead of a complete circle. Sometimes it reads; sometimes it doesn't.

It clearly is as important a vote as a dimpled chad or something that is caused by a fingernail rubbing across a ballot, and clearly needs to be looked at. Sometimes, also, Your Honor, they color in the little box, or the little circle, rather, and they write the same name below it.

That is considered an overvote by the machine and not counted as well. That needs to be looked at.

[51] And then the final point I had, Your Honor, was that — that may be it. But these points are very important to be taken into consideration.

The final point is there needs to be time for appellate review. And the idea of having daily tallies — the purpose of this drill, Your Honor, is to conduct a complete manual recount. Not to create opportunities for press conferences, two or three times a day to indicate how our guy is doing depending on whether you start at the bottom or the top end of the precincts.

So all this information has to be tallied at one time, because, otherwise, what it's going to be is a public spectacle which is going to be worse.

THE COURT: Let me ask you something, because the Secretary, at least it appears, doesn't have a preference for one side or the other. You're a Defendant because that's your job, and you have to certify the results.

Would you have any problem with, in terms of the logistics of getting results from the other counties, that they do it as they normally would do, which is to send it to your office?

MR. KLOCK: That would be nine. They know how to do that and they do it. And, Your Honor, with respect to the other arguments that are being made, under 97.012, the Secretary also has the responsibility for the uniformity of [52] elections, and how they're conducted and that kind of thing. So that is the reason why the other objection.

You're correct, Your Honor, the Secretary does not have, as Secretary, a horse in the race. Nor does the Attorney General.

MR. GREENBURG: Your Honor, if I may, this is Murray Greenburg in Miami.

MR. DOUGLASS: That's what I was waiting on. It really wasn't, but I wanted to suggest this —

MR. GREENBURG: If I may, you have the ballots and all our elections —

THE COURT: Mr. Greenburg, can you wait a minute? I'll certainly let you talk. But I got a couple of them standing up there. I won't leave before I let you talk. Okay?

MR. BECK: Your Honor, I'd like to address a couple of points Mr. Boies raised.

THE COURT: Just one second, I think he's got a procedural point.

MR. DOUGLASS: I would suggest, again, we be a little more formal, because we made a presentation, they made a long, long presentation. We made a presentation. And that, normally, in most proceedings, then the Court takes over and asks questions.

We don't want to get into this, again, because Mr. Beck is one of the longest speakers I know, and I would like to [53] ask that — and he's from Illinois and they do things different there. But I would like to ask the Court to, please, if we could set some structure that would prevent this, where we finish, and they get up, again, because — if it's just a little thing like the Secretary, he had a point there.

But, you know, we're going to be here forever. So I'm asking the Court, if we could, consider that, certainly, in future hearings.

THE COURT: Well, I can consider it right now, actually, because it is almost ten o'clock now, and I need to do something, otherwise we will be talking about what we're ease going to be doing forever.

MR. BECK: Your Honor, what they did in their presentation —

THE COURT: Let me stop you, Mr. Beck. I don't want to argue back and forth and objecting. What I wanted is input. And if you don't have any more input for me, that's fine. But if you have something that you should tell me I'm going to do, I will listen.

MR. BECK: I do, Your Honor. I first want to reinforce what the Secretary of State's counsel said, that we also are concerned about running tallies and press conferences. As far as we're concerned, there is no number that comes out of these things until the Court resolves any disputes as to [54] ballots.

And the Court ought to be releasing the information when it's done with its work, rather than having running voting tallies. So that as soon as, you know, one candidate gets in front of another, all of a sudden people are claiming victory. We ought to have the Court resolve the disputes and then release the results.

Another item that is also on your plate is you're going to need to hear from us both tomorrow, I would suggest, about how many there are down in Palm Beach.

Mr. Boies as used the number 215, which the Supreme Court used, but the Supreme Court also noted in a footnote, that we say it's a lower number, and that they take no positions on that. You're going to have to resolve that.

Appendix A

Your Honor, the Supreme Court says on page 39, when talking about Miami-Dade, about the counting machine registered these as nonvotes and they've never been manually reviewed. We think you have to look at all the nonvotes, not just the subset of undervotes.

Mr. Boies argued the South Dakota case as if that meant that any kind of dimple or indentation is an indication of intent.

I have the South Dakota case. What they say about — they talk about two chads in the South Dakota case. And one of them was good old chad number 88, and they say, "Two of [55] the four corners of this chad had been broken and one side is separated." So that's a hanging chad. The other chad was a patterned chad, where they say, "It's important to note that when this ballot is viewed in its entirety, at least four additional chads are partially punched in the same manner."

So the only chads that were at issue in the South Dakota case that the Supreme Court referred to, were either hanging chads, or the kind of patterns that we talked about, not the kind of rogue dimples that they want.

Judge, in terms of the stages of a recount, and I don't want to bore you with the gory details. I suggest we present you with something in writing about the stages that people go through in a recount.

We think, briefly, that the counties ought to cull the nonvotes out from the other ballots, preserving the integrity of the counts, the way I referred to before.

We think that the Court should announce what factors are to be examined when determining voter intent, the criteria that are relevant to that determination.

THE COURT: I think you're summarizing your previous argument. I've got to get going.

MR. BECK: Okay. The last point, Judge, is Mr. Boies was absolutely wrong when he said three times that somehow Governor Bush suggested that the Leon County Supervisor of Elections was the right person for doing the job.

[56] We say the Court should do it. The Leon County Supervisor of Elections — I don't know him, and I'm sure he's an honorable man and a good public servant, but he's also a loyal Democrat.

Democrats on the Canvassing Boards of Miami-Dade and Broward County made the decision that turned hundreds of nonvotes into votes for Al Gore. And now they're suggesting that a Democrat in Leon County make the determination concerning the Republican counties, and we don't think that's right.

THE COURT: I think the Supreme Court is suggesting that the supervisor of elections in the counties may assist the Court in making the count. And I don't think the Democrats are suggesting anything.

MR. BECK: I'm suggesting to the Court that it's the Court's decision to make. It was authorized to do that by the Supreme Court. We think it's a bad idea. We don't think that if the

concern is with public confidence and the integrity of the election, you should do that.

THE COURT: Let me ask all sides on this. The other counties, theoretically, as per the order, would have the Canvassing Board doing the counting, like they normally would, or somebody down there in the counties. What if the ballots were taken to Dade County, and a similar procedure was used there and then report back just like they normally [57] would? Any reason why it has to be done here?

MR. BECK: You said Dade County?

THE COURT: Yes. I'm suggesting to you —

MR. DOUGLASS: I understand.

THE COURT: Is there any reason why we couldn't take the Dade County ballots down to Miami, and let the people that normally would count them, count them.

MR. BECK: I think on that one, the Supreme Court was fairly clear. I thought the Supreme Court directed the Court to undertake that task. I think it left open to the Court to undertake the rest of the task, but that one, specifically, was directed to the Court to do it.

THE COURT: Well, yes. But, theoretically, they asked me to use the supervisor of elections here, or sworn designee. Is there any reason why that couldn't be the Dade County folks?

MR. BECK: We would object to that. We think the Court ought to be doing that, under the standards articulated by

the Court we don't think that's contemplated by the Court's order.

THE COURT: Anyone else?

MR. BOIES: Just very briefly, Your Honor. I think we would agree that the Miami-Dade ballots ought to stay here. Our reasons are a little different, but I think the time consumed in sending that number of ballots back down, and [58] then getting the results back, would defeat the purpose of the immediate review.

THE COURT: Okay.

MR. BOIES: With respect to Mr. Klock's point in which he said that that, in reference to these ballots being reviewed in the counties, nine lines from the end, it is nine lines from the end, about, maybe a little more, but in those nine lines is where the Supreme Court talks about the Court having the assistance of the supervisor of elections.

So I think you could use the supervisor of elections, if the adequate resources were there.

And, third, with respect to the criteria to be used, it seems to me, if you're looking at the Duffy case, which is South Dakota case, the right thing to look at is how the Florida Supreme Court characterized that whole thing.

THE COURT: Mr. Greenburg, it's your turn. Do you want to say anything.

MR. GREENBURG: Yeah, but, Judge, let me just say this at this point: We will do whatever the Court wants. We're here to assist the Court, the supervisor, and all the officials here in the county.

What we need to know — and I think Your Honor will agree with this — we need to know soon. Our ballots are there; we're here; we're fine with that.

(LAUGHTER.)

[59] MR. GREENBURG: The next plane would require our getting up at 4:30 in the morning, which is fine. But we need to know what you want to do, who you need up there.

And if it's just going to be legal argument, what time you would want anybody, we will do whatever you want. You've heard enough from all the lawyers, myself included. Just please tell us what you want us to do and we'll do it.

THE COURT: Thank you. I'm going to take a recess and consult the high authorities and be back with you — I won't tell you when, but I'll be back before the evening.

And I'm sorry to make you wait, and I know everybody as been working overtime, but I'll have to come up with something, having had input from you, that I think will work.

I'll be back to tell you what I think it is.

(DISCUSSION OFF THE RECORD.)

Appendix A

RULING BY THE COURT

THE COURT: I apologize for keeping you all waiting. I know it's late.

Well, we've got two different counts to be concerned with. One is the Dade County ballots that are here in Leon County. The other involves the rest of the counties in the state. This is not perfect, but I'm going to give you what I plan to do with regard to both of those counts. You may have objections to that. You may have questions about it. But because of the lateness of the hour, and the exigent [60] circumstances, I ask that you make your objections in writing and give them to me tomorrow morning through the Court Administrator's Office. And I'll take some action on that and review them at that time.

First of all, when we do the count, what we're going to be looking at are what are considered nonvotes or undervotes.

Those would be where a counting machine does not register the vote, or does not register all the vote.

For the Dade County vote, which is still here in Leon County, we will keep the ballots here and count them here.

I'm going to ask the supervisor of elections, or his sworn designee, I'm going to ask that Mr. Sancho contact Mr. David Leahy. Do we still have Mr. Greenburg?

I guess that was a long time for him to wait on the phone.

I believe he was the attorney indicating they'd be willing to help any way they can. The staff of the Clerk of the Court is available for the purposes of helping in the count, the Supervisor of Elections can work with the supervisor in Dade County to the help count those votes.

I'm very concerned with the perception of these votes, and whether they're going to be done accurately and fairly. In that respect, I've asked my colleagues here in the Second Circuit to assist in this.

[61] Theoretically, I guess we've had counts normally with teams of two. Normally there's a Canvassing Board there that would resolve any questions about whether a vote is or is not a vote. That's the way I understand this goes. For those teams of two, I have asked two judges to act as arbiters, basically, if there's a question about that, and those judges can resolve that dispute or question about the ballot.

If those two Judges can't agree, it will be sent to me and I'll resolve that finally. That's how we'll do the vote here.

I'm going to have them start tomorrow morning at eight o'clock.

And I believe the facility will be the Leon County Public Library. They'll have some room there to accomplish that.

The press will be allowed. We'll make arrangements. Any questions about how to do that should run through the proper administrator's office. The counting that's done there will be open for observation by the parties.

But what I'd like to do, even though this has been said in many Court cases so far, the voters are the real party in interest. There are two candidates here, that would be Governor Bush and Vice President Gore.

You can have anybody you want designated for a team. But all the rest of you, I'm sorry, I'm just going to leave [62] it that way. If you can get them to let you there, you can be an observer, as well.

If we start at eight, my target date — not my final date — but I hope to be finished no later than two o'clock p.m. on Sunday, which would be December the 10th.

As we discussed before, the Secretary of State, and the Divisions of Elections will assist.

It won't be necessary for ours here, but I'd rather go ahead and probably use that in terms of sending the results that we have here, through the Supervisor of Elections to the Division of Elections for a certification of those results.

At — and I want to emphasize: This is not a protest count of votes. This is a count of votes as a result of a contest of an election, under which there is broad powers, apparently, for the trial judge to fashion a remedy.

So when I say there will be observers at the county, there won't be as you would normally have in a protest, the opportunity to make an objection to each ballot, to mark it, to see it.

You'll be able to observe. You can make a note on a notepad, if you'd like. You can raise those objections later in writing with me. But in terms of each individual ballot, I want the county to go as smoothly as possible. As I've indicated, there will be at least two other judges available to arbitrate any questions there. But I don't want anybody [63] raising a vocal objection at the time of the voting, or otherwise trying to disrupt the count in any way.

Now, for the other counties, just as the Supreme Court has indicated in its order, I would respectfully direct Canvassing Boards in the counties who have not, or have not previously done a manual count of nonvotes or undervotes, to take steps immediately to do so. Specifically, I would request that, by twelve o'clock p.m. tomorrow, Saturday, fax to the Office of the Court Administrator, which I do have that number somewhere, the fax number. Do I have somebody from the Court Administrator's office here? I sure don't want to give out mine. (850) 487-7947.

What I'd like faxed there is some indication of the protocol purported or proposed by the Canvassing Board. And this could be the Canvassing Board, but not limited to the Canvassing Board. But such other public officials, including the Supervisor of Elections, and their offices, staff, employees, whatever is necessary in their estimation to do the count required by the Supreme Court with, again, a target date of 2:00 p.m. on Sunday for those results to be sent from there to the Division of Elections for certification. The same procedure would apply in terms of the observers, in terms of the objections, and the indications that I had before as to the vote in Leon County. I'm not going to direct exactly how to

do that. I'm [64] going to leave that to the discretion of the Canvassing Board, in terms of deciding the parameters of who would do the counting and how they'll do it. To my colleagues around the state, my judicial colleagues, I would request that you offer your assistance in the same manner my colleagues here in the Second Circuit have offered, for the reason I have indicated, to give some objectivity and partiality to the process itself, to reduce, to the extent possible any objections to the manner in which it was conducted. I'm not directing that or ordering that, but simply a request. And I'll leave it to the Canvassing Boards to decide how they will best do it. But they will report by twelve o'clock the protocol they intend to use, the estimated time schedule, and I'll review that at that time. The standard to be applied in doing this count is the standard that the Supreme Court has set forth in its recent order.

The Supreme Court has twice been given the opportunity and requested to get more specific criteria in terms of how to count ballots manually. They've declined to do so. And I see in that a clear indication that they wish to leave that to the Canvassing Boards and the persons that do the manual counting, guided only by that principle that's laid out in the opinion.

I think I indicated, I would ask that the Canvassing [65] Boards in those counties, when they've completed their counts, to forward that through the normal procedures to the Division of Elections for certification.

And with that, I know you probably have questions and objection. As I indicated before, if you'll put those down in

writing, I will do my best sometime tomorrow morning to reduce this to writing. And if I could get a transcript, that would help me. I would appreciate it. But I need something in writing.

MR. BECK: We will put our objections in writing in the morning. I just want to alert the Court that there was an outstanding matter in front of Judge Sauls. We had made a motion to exclude the Miami-Dade ballots on grounds of ex —

THE COURT: Mr. Beck, I just said, put all your concerns in writing. I will not hear any thing more tonight.

MR. BECK: I'm concerned that the counting is going to begin before the Court hears the evidence on whether the ballots are in shape to be counted.

THE COURT: I understand. Any concerns you have, any objections you have, put them in writing. I'll review them in the morning. Put them through the Court Administrator's office. I'll be in touch with the attorneys through the Court Administrator's office. We may meet again, but that's what I'm going to do. Thank you very much.

(HEARING CONCLUDED AT 11:49 P.M.)

Appendix A

[66] CERTIFICATE OF REPORTER

STATE OF FLORIDA:
COUNTY OF LEON:

I, B. J. QUINN, Certified Realtime Reporter, Registered Professional Reporter, and Notary Public in and for the State of Florida at Large:

DO HEREBY CERTIFY that the foregoing deposition was taken before me at the time and place therein designated; that before testimony was taken, the witness was duly sworn; that my shorthand notes were thereafter transcribed, via computer, under my supervision, and the foregoing pages numbered 1, through 66, are a true and correct record of the aforesaid proceedings. I FURTHER CERTIFY that I am not a relative, employee, attorney, or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

WITNESS MY HAND AND SEAL
this, the day of OCTOBER, A.D., 2000,
IN THE CITY OF TALLAHASSEE,
COUNTY OF LEON, STATE OF FLORIDA.

B. J. QUINN, RPR, CCR, CMR
Certified Realtime Reporter
519 East Park Avenue
Tallahassee, Florida 32301
(850)222-5508
My Commission Expires March 20, 2001

Appendix A

CERTIFICATE OF NOTARY

STATE OF FLORIDA:
COUNTY OF LEON:

I, B. J. QUINN, Notary Public in and for the State of Florida at Large, do hereby certify that the witness personally appeared before me and was first duly sworn by me to testify to the truth on the date and time indicated herein.

B. J. QUINN, RPR, CCR, CMR
Certified Realtime Reporter
519 East Park Avenue
Tallahassee, Florida 32301
(850) 222-5508.

APPENDIX B — ORDER ON REMAND OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA DATED DECEMBER 9, 2000

IN THE CIRCUIT COURT OF THE SECOND
JUDICIAL CIRCUIT IN AND FOR
LEON COUNTY, FLORIDA

CASE NO. 00-2808

ALBERT GORE, JR., AND JOSEPH I. LIEBERMAN,

vs.

KATHERINE HARRIS, as Secretary, etc., et al.,

ORDER ON REMAND

This case is before the Court upon remand from the Supreme Court of Florida in ***Gore v. Harris***, No. 00-2431 (Fla. Dec. 8, 2000), and upon recusal of the original trial judge. Pursuant to the instructions provided by the Supreme Court of Florida, the Court will immediately tabulate by hand the approximate 9,000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed. The Court will include in such tabulation the additional legal votes for Gore in Palm Beach County and the 168 additional votes from Miami-Dade County.

In accordance with the provisions of Section 102.168(8), Florida Statutes the Leon County Supervisor of Elections or its sworn designees, which may include election officials

from Miami-Dade County, will assist the Court with the manual recount. The counting process shall begin at 8:00 a.m. on Saturday, December 9, 2000, at the Leon County Public Library with sufficient two person teams of counters so as to complete the count by 2:00 p.m. on Sunday, December 10, 2000.

In determining if a legal vote has been cast, the standard to be applied is: if there is a "clear indication of the intent of the voter" then the vote should be counted. If not, the vote should not be counted.[1] If there is a question in this regard as to any ballot, it shall be reviewed and determined by a team of two judges from this circuit, several of which will be on-site. If the two judges do not agree, the ballot will be segregated and reviewed by me for final determination. No partial counts will be done or reported, formally or informally.

For each team of counters, Plaintiff Gore and Defendant Bush may designate one person to act as an observer of the process. This person may not make a verbal objection or challenge to any particular ballot determination nor in any way disrupt or interfere with the counting process. Any objections or challenges shall be in writing and filed with the Clerk of Court.

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1. Some of the parties have requested that I establish specific criteria to utilize in applying this standard. The Florida Supreme Court has been asked at least twice recently to do so and has specifically declined. The only guidance is the language in the statute quoted above.

Appendix B

The Supervisor will report the final results to the Court upon completion, and shall certify the results to the Division of Elections. Any additional votes as determined by this Court in resolving disputed ballots shall be added to these totals for certification by the Division of Elections.

The Court, consistent with the Supreme Court's Opinion, hereby directs that the Supervisors of Election and the Canvassing Boards, with the assistance of any necessary public officials, in all other counties that have not conducted a manual recount or tabulations of the non-votes or undervotes to do so forthwith, said tabulation to take place in the individual counties where the ballots are located. The standard to be applied in determining what is a legal vote, the time targeted for completion, and the method of reporting results, shall be the same as noted above for the counting of the Miami-Dade County votes.

In the interest of promoting the public's trust and confidence in the objectivity and impartiality of the counting process, the counties are urged — but not required — to enlist the services of its judges where appropriate, in a manner similar to the process outlined above. The method and manner of the count shall be determined by the Canvassing Boards.

The Canvassing Boards of the respective counties shall fax to the Court at (850) 487-7947 by noon, Saturday, December 9, 2000, a report as to their proposed protocol for the count and an estimate of the time to complete, and any problems anticipated by the Boards are also directed to advise the Court by 10:00 a.m. on Sunday, December 10, 2000, as

to the status of the count, and from time to time as the Boards deem appropriate.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 9th day of December, 2000.

s/ Terry P. Lewis
TERRY P. LEWIS, Circuit Judge

APPENDIX C — OBJECTIONS OF SECRETARY OF STATE AND ELECTIONS CANVASSING COMMISSION DATED DECEMBER, 2000

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT, LEON COUNTY, FLORIDA, CIVIL DIVISION

CASE NO. 00-2808

ALBERT GORE, JR., Nominee of the Democratic Party of the United States for the President of the United States, et al.,

Plaintiffs,

v.

KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, et al.,

Defendants.

OBJECTIONS OF SECRETARY OF STATE AND ELECTIONS CANVASSING COMMISSION

Under Section 97.012, Florida Statutes, the Secretary of State is the Chief Elections Officer of the State of Florida. It is the Secretary's duty to obtain and maintain uniformity in the application, operation, and interpretation of Florida's election laws. Under Section 102.111, Florida Statutes, the Canvassing Commission certifies the returns of the elections and determines and declares who has been elected for each office. Accordingly, pursuant to the Court's directions, the

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Secretary of State and the Canvassing Commission hereby submit their objections to the process and standards for the statewide partial manual recount ordered by the Florida Supreme Court in this presidential election and in this Court's order, entered in open Court at 11 p.m. on December 8, 2000, in accordance with the Florida Supreme Court's judgment (the "Order," all collectively the "Procedure") as follows:

1. There is insufficient time, due to the impending federal deadlines to complete any manual recount with any degree of accuracy applying meaningful standards.

2. The Procedure permits no opportunity for meaningful appellate review or for meaningful review by this Court of the decisions and conclusions reached in the various counties conducting the partial manual recounts.

3. Any manual recounts undertaken must be on a statewide basis, and must be of all ballots, not a subset of ballots culled though standardless and undefined exercise of unreviewable discretion of persons and entities not before the Court who are attempting to identify "undervotes" for further review.

4. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the partial manual recount of ballots solely to address voter error.

5. There is no basis in the Florida Statutes in existence prior to November 7, 2000, that would permit a manual recount of ballots in circumstances other than for the reasons and in the manner set forth in section 102.166(4) to (7).

6. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a manual recount in Miami-Dade, Broward, or Palm Beach Counties following the results of the manual test undertaken by each county's canvassing board pursuant to Section 102.166(4) prior to the initiation of the manual counting.

7. To the extent that the Court is ordering a recount of less than all ballots, it must at least consider all ballots including overvotes, undervotes, and any other category of "non-votes."

8. There is no basis in Florida law in existence prior to November 7, 2000, to undertake only a count of undervotes when those numbers of votes are to be added to additional votes gleaned from a larger selection of votes.

9. The law of Florida in place on November 7, 2000, did not permit the elections supervisor or canvassing board of one county to count the ballots of another county.

10. There is no basis in Florida law in existence prior to November 7, 2000, that would permit Miami-Dade County's ballots to be counted in Leon County outside of the presence of voters from Miami-Dade County and by officials other than those identified in sections 102.166(7).

11. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a contest of undervotes to be initiated in the contest phase over a two-day period with another two-day period being provided for all appellate review.

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12. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the counting by machines or by humans of other than fully punched chads.

13. There is no basis in Florida law in existence prior to November 7, 2000, that would permit some races in Florida to be decided on statewide manual recounts while others are not.

14. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the Miami-Dade Canvassing Board to use a software program that supposedly separated "undervotes" from properly voted ballots when such program has not been approved in advance by the Division of Elections, as required by Florida law. The Secretary objects to the sorting of ballots based on software that is untested and uncertified by the Florida Division of Elections in violation of preexisting Florida law and practice.

15. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a circuit judge to order ballots to be counted without requiring the counting individuals to measure each ballot against the instructions provided to the voters when using the punch-card and ballot voting devices as required by Florida Statute section 101.46.

16. To permit individuals drawn from the Leon County Circuit Court to sort and make canvassing board decisions for Miami-Dade County votes differentiates Miami-Dade County voters in that their votes are not being counted by fellow county citizens drawn from the same county and they are deprived of local standards that were available to voters in Broward and Palm Beach counties.

Appendix C

17. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the manual recount of all ballots in some counties such as Broward, Palm Beach and Volusia counties while the recount of votes in other counties are being limited to "undervotes."

18. The Secretary objects to the Procedure and any partial statewide manual recount which results in abrogating the rights of citizens under the equal protection and due process clauses of the United States Constitution.

19. The Secretary objects to the counting of ballots from Miami-Dade County under a process separate and distinct from the process to be applied in the other counties of Florida without meaningful standards.

20. The Secretary objects to conducting a partial manual recount in the absence of any valid, coherent reason for such a recount and without an evidentiary basis supporting the necessity of any recount.

21. The Secretary objects to a manual recount of a less than all the ballots of Miami-Dade County because there is no evidentiary basis to conclude that the subset of ballots culled from Miami-Dade County for a manual recount constitutes votes which have not previously been counted. The process ordered is likely to result in the counting of votes multiple times and therefor the dilution of other votes not so counted.

22. The Secretary objects to the inclusion of the Palm Beach County recount because to this day, no executed return

of results from Palm Beach County has ever been submitted and there is, therefore, no legal basis for including such votes in any final tally.

23. There is no basis in Florida law in existence prior to November 7, 2000, that would permit assignment of subjective voter intent based on subjective interpretation of ambiguous, undefined marks on computer punch cards.

24. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the assignment of subjective voter intent based on subjective interpretation of ambiguous, undefined marks on marksense ballots.

25. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a court to establish the procedures for undertaking a manual recount of ballots and in determining voter intent.

26. Any attempt by a court to establish criteria and standards for determining voter intent invades the province of the legislature in the selection of presidential electors.

27. The Procedure intrudes upon the powers and duties of the Secretary and the Commission by stripping both of any but ministerial duties in the election process.

28. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a selective county challenge of a statewide race or the challenge of races that extended beyond any one county without the objector seeking a recount in all of the counties affected by the race.

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29. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a contest of undervotes to be initiated in the contest phase over a two-day period with another two-day period being provided for all appellate review.

30. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the circuit court to issue advisory opinions regarding the conduct of the balloting and tabulation process.

31. The Secretary and the Commission object to the procedure to the extent that the Procedure violates Sections 102.141(2), 101.572, or the Florida Sunshine Law.

Dated this __ day of December, 2000.

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No. 00-949

In the Supreme Court of the United States

October Term, 2000

George W. Bush and Richard Cheney,
Petitioners,

v.

Albert Gore, Jr. et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF THE NATIONAL BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The National Bar Association ("NBA"), founded in 1925, is the nation's oldest and largest national association of predominately African American lawyers and judges.[1] Through its 87 affiliate chapters, the NBA represents a professional network of over 17,000 lawyers, judges, educators and law students. The NBA's purposes include protecting the civil and political rights of all citizens of the United States. The NBA is nonprofit and nonpartisan.

Over the past five decades, NBA members have participated in most of the nation's seminal voting rights cases. The NBA has

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1 As it goes to press, the process of securing consents of the parties has not been completed. Consequently, if *amicus curiae* is unable to file this brief pursuant to S. Ct. Rule 37.3(a) with the consent of the parties, the brief will be supported by a motion pursuant to S. Ct. Rule 37.3(b). Pursuant to S. Ct. Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

convened a twenty-member Elections/Voting Rights Task Force to seek long term reform of federal and state election procedures. The proposals in Section II of this brief were developed by the Task Force.

The NBA will not repeat the parties' arguments on questions of Florida law and federal constitutional law. Instead, as an *amicus curiae*, the NBA wishes to raise issues unlikely to be directly addressed by the parties. The NBA seeks particularly to enrich this Court's review by placing the issue of vote tallying and recording in historical context.[2] The NBA also prays that this Court would call attention to several noncontroversial potential initiatives whose adoption could enhance public confidence in elections and prevent all but the most rare election litigation from arriving at any court's doorstep.

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2 While the NBA supports neither side in this case, out of an abundance of caution its brief is captioned "in support of respondents" because one of its arguments (Section I *infra*) expresses skepticism of petitioners' prayer for relief, given the history of efforts to discourage the casting of legal ballots and to diminish the effect of such ballots once cast.

SUMMARY OF ARGUMENT

The unfortunate and unique circumstances of this case obscure the relative simplicity of the equities. More blood has been spilled in this century over the right to vote than over any other privilege of citizenship. America has put an end to the White primary and racial gerrymandering -- techniques that prevented African Americans from voting at all. It has rejected apportionment systems rigged so that certain votes counted far less than other votes. And it has renounced literacy tests, poll taxes, grandfather and "fighting grandfather" clauses that discouraged or prevented African Americans from casting a vote. This long and ignoble history provides the context for the issue of whether to completely tally and record legal votes.

In an accurate and fair election, completeness and finality are symbiotic rather than antagonistic goals. Guided by this principle, the NBA's Elections/Voting Rights Task Force has set out a wide range of noncontroversial, nonpartisan, race-neutral standards and procedures whose adoption could restore public confidence in the sanctity of the franchise and hasten the day when this

or any Court will seldom have occasion to hear an election case. We ask only that this Court note the existence of these potential reforms, and commend them to legislatures, agencies and the bar for thoughtful consideration.

ARGUMENT

I. Failure To Tally And Record All Legal Votes Disenfranchises Voters And Undermines Democracy

In any election case, every court should begin by recognizing that

> [t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.[3]

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3 *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Tactics that infringe on this right are an unfortunate but hardly a recent creation of politics. While such tactics have been visited repeatedly and notoriously on the descendants of slaves,[4] they have sometimes had a nonracial cast,[5] as in the issues framed by the parties now before this Court.

The imperfect and colloquial public perception of this case is that a litigant named Finality has engaged in battle against a litigant named Completeness. Each litigant has virtues. This Court ought not assume that Finality intends to disempower the voters. Absent crossexamination, discerning the intent of private parties eludes all tribunals; even the intent of public actors is

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4 *See, e.g. Nixon v. Herndon*, 273 U.S. 536 (1927) (outlawing the White primary).

5 *See, e.g. Baker v. Carr*, 369 U.S. 186 (1962) (holding that the malapportionment claims of large cities were justiciable).

difficult to divine in election litigation.[6] Nonetheless, even a well-intended effort to persuade a tribunal to eschew the tallying and recording of legal votes inevitably would have the effect of disempowering the voters.

The contentions of those favoring such an outcome are open to a skepticism informed by the history of African America's journey to the ballot box. The soil of the American South is yet damp with the blood of martyrs to the dream of an accessible and meaningful ballot.[7] Paying with their lives, civil rights heroes delivered us the very hallmark of democracy: the citizen's confidence that he may exercise his right to cast a ballot at his polling place, and that the vote he

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6 In *Rogers v. Lodge*, 458 U.S. 613, 620-21 (1982), *rehearing denied*, 459 U.S. 899 (1982), this Court eased the evidentiary standard for proof of racial vote dilution, substantially modifying the intent-based rule of *Mobile v. Bolden*, 466 U.S. 55 (1980).

7 In *Parting the Waters* 485-91 and 507-15 (1988), Taylor Branch describes at length how it was in the early 1960s "that Negroes could always be gunned down with impunity for showing interest in the ballot." *Id.* at 510.

thought he cast there will be recorded in the election.[8] That confidence, flowing directly from the fundamental principle that "[n]o man is good enough to govern another man without that other's consent",[9] is so embedded in our psyches that most Americans are no longer conscious of it. The sanctity of the franchise has "become part of our national culture."[10]

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8 This Court has declared that it is "as equally unquestionable that the right to have one's vote counted is as open to protection ... as the right to put a ballot in a box." *United States v. Mosley*, 238 U.S. 383, 386 (1915). As Mr. Justice Douglas characterized the issue,

> There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted.

South v. Peters, 339 U.S. 273, 279 (Douglas, J., dissenting), *rehearing denied*, 339 U.S. 959 (1950).

9 Abraham Lincoln, Speech, Peoria, IL, October 16, 1854.

10 *Dickerson v. United States*, 120 S.Ct. 2326, 2336 (2000) (Opinion by Rehnquist, J.) (reaffirming the holding of *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)).

America arrived at this promised land after traversing a history littered with abhorrent disenfranchising tricks and devices. Today's failure to tally and record legal ballots is the ill-begotten child of three overlapping generations of disenfranchisement schemes. The great-grandfather of not tallying and recording legally cast ballots was a set of voter eligibility rules that prevented African American voters from voting at all.[11] Its grandfather was an apportionment system rigged so that some legally cast votes counted far less than other votes.[12] And its father was an array of voter disqualification devices that discouraged or

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11 *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (outlawing deliberate racial gerrymandering); *Nixon v. Herndon, supra.*

12 *See Baker v. Carr, supra.*

prevented otherwise eligible Americans from casting their votes.[13]

Thankfully, these disenfranchisement techniques seldom arrive anymore on this Court's docket. Yet they cast a long shadow over the instant litigation.

As the repository of the nation's judicial history, this Court should note the lineage of the disenfranchisement technique that has raised its head in this case. While casting no aspersions on the intentions of its proponents, this Court should hold to the most exacting burden of persuasion anyone who seeks to

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[13] *See Oregon v. Mitchell*, 400 U.S. 112 (1970) (outlawing literacy tests); *Harper v. Va. Board of Elections*, 383 U.S. 663 (1966) (outlawing the poll tax). Ingenious and elaborate waiver mechanisms were applied to ensure that literacy and residency schemes disenfranchised only voters of color. *Cf. Giles v. Harris*, 189 U.S. 475 (1903) (discussing the "fighting grandfather" clause, which enabled Whites to avoid literacy tests).

prevent the tallying and recording of legally cast votes.[14]

II. This Court Should Encourage Legislatures, Agencies And The Bar To Consider A Wide Range Of Election Reforms

In times of actual or even perceived constitutional crisis, this Court is uniquely positioned and endowed with the power and duty to encourage national unity and public confidence in our system of democracy. This Court has often enriched its opinions with steadying words that have healed the nation

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14 As the Florida Supreme Court held unanimously when it rejected a request to exclude votes from being recorded because they were not timely reported to the Secretary of State, the contesting candidate

> has presented no *compelling reason* for disenfranchising the 11,000 residents of Flagler County who cast their ballots on November 8.

State ex rel. Chappell v. Martinez, 536 So. 2d 1007, 1009 (Fla. 1988) (emphasis supplied).

facing a crisis[15] or when the law simply must be writ large enough for all to see.[16] When

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[15] This Court's steadying hand did its most honorable work in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("*Brown I*"). Chief Justice Warren's unanimous opinion went out of its way to explain to the nation its holding that separate public schools are inherently unequal, pointing out that education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *See also Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (holding that "[n]o state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.") Each justice helped reaffirm the essential principle of federalism by personally signing this Court's unanimous opinion.

[16] Even when no national crisis is apparent, the facts of a case may cry out for statesmanlike words and expansive explanations of this Court's reasoning. A prime example: by 1968 it had become obvious that hundreds of school systems had misinterpreted the infamous "with all deliberate speed" formulation of *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) ("*Brown II*"). This Court spoke expansively in explaining why *de jure* segregated school systems have

[n. 16 continued on p. 12]

steadying the nation requires prospective reform, this Court should not hesitate to say so.[17]

In that spirit, we ask this Court to call attention to the existence of a wide range of noncontroversial, nonpartisan, race-neutral standards and procedures whose implementation could help restore public confidence in the democratic process and

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16 [continued from p. 11]

an affirmative duty to desegregate, rather than merely to decline to enforce segregation. *Green v. County School Board*, 391 U.S. 430, 438 (1968) (holding that an ostensible desegregation plan that "fails to provide meaningful assurance of prompt and effective disestablishment of a dual system" is intolerable.) Three years later, this Court spoke with equal force in explaining why the use of arbitrary barriers to the employment of members of minority groups could no longer be tolerated. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

17 *See, e.g., Brown I, supra*, 347 U.S. at 495 (ordering further proceedings which would take account of "the wide applicability of this decision, and ... the great variety of local conditions ...."

diminish the likelihood that elections will be litigated. We do not ask this Court to endorse any of the proposals we set out below. Instead, we ask only that this Court observe that they may be worthy of study by legislatures, agencies and the bar.[18]

The proposals we summarize below are among those which the NBA is transmitting to its fellow national bar associations for their consideration, study and endorsement.

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[18] Some reforms must come from the body politic itself. Desirable as they may be, this Court might be unable to find, within its powers under Article III, Section 2 of the Constitution, authority even to draw attention to the need for ballot literacy efforts to ensure that eligible voters know how to cast a ballot, or the need to ensure that voting procedures keep pace with demographics and technology. The proposals set out herein are limited to subjects that have found, or might find their way into the courtrooms of Article III judges.

1. Election integrity: ensuring that every eligible voter, and no other person, can cast a vote

    a. States should adopt procedures to ensure that every person presenting himself at the polls should be allowed to vote (by regular ballot, or by affidavit or protest ballot) if he is listed on the rolls *or* possesses identification or a valid voter registration card or other identification, and if he executes a competent written declaration that, to the best of his knowledge, he is eligible to vote.

b. States might consider uniform, enhanced procedures to prevent absentee and mail ballot fraud or coercion. Reforms that might be considered include bright-line, uniform rules governing the types of absentee or mail ballot irregularities for which the remedy is disqualification of the ballot, and more clearly defining the rights of political parties and other groups' permissible involvement in distributing absentee ballot applications and in collecting and presenting absentee ballots.

c. States, and the federal government, might endeavor to harmonize their criminal statutes aimed at preventing and remedying election tampering, whether caused by negligence, intentional misconduct or fraud.

2. Access to the franchise: removing even the appearance of impediments to registering and voting

   a. Registration by mail, fax, online, or by any other reliable means should be encouraged by every state. Registration deadlines should not be needlessly early, nor should durational residency requirements be inconsistent with the customary practices of other states.

   b. Absentee and mail ballots should be treated as overnight/expedited by the U.S. Postal Service.

   c. Those in line to vote when the polls close should never be turned away.

   d. There should be a sufficient number of polling places in each community to accommodate all voters without substantial delay.

e. Changes in polling locations should be widely publicized in advance, with mailed notices to registered voters using the relocated site. Those who nonetheless appear at their former polling site should be given directions and a map showing the new site.

f. Sufficient staff and telephone lines should be available at each county clerk's office to facilitate the receipt of calls from precinct poll workers without extensive delays or busy signals.

g. Voter lists should be current as of the date of the election, so that no registered voter will be turned away.

h. States might consider minimum standards for polling places, ensuring that they will have sufficient voting machines and staff to ensure that voters seldom must wait more than a few minutes to vote; that they are fully handicapped-accessible; that voters have sufficient space to wait indoors to vote; that they are heated and well-lit; and that translators are be available, in person where possible and otherwise electronically.

i. Reducing impediments to voting turns in part on the quality of service provided by poll workers. Ultimately, states might aim to certify all poll workers, thereby assuring the public that poll workers have recently been instructed in the basics of election law and procedure.

j. Poll workers should encourage voters to ask for help or for a substitute ballot if needed. Poll workers might say to each voter: "You can ask me a question at any time. Even after you go into the voting booth, it's OK for you to come out and ask me for help. If you make a mistake, I will be happy to give you another ballot." Through repetition, this uniform incantation would ideally achieve the universality and public acceptance of a *Miranda* warning.

3. Procedural fairness: ensuring that states' dissimilar voting procedures are nonetheless fair and evenhanded

   a. A Restatement of Election Law would provide a quick reference guide to customary practices.

b. Each state attorney general might consider designating a representative to meet at least annually with his counterparts from every other state in an effort to consider equalization or harmonizing of widely disparate election procedures.

4. Mathematical accuracy: ensuring accurate and complete vote counts and recounts

a. Local election officials should endeavor to standardize and simplify ballot design and eliminate confusing designs such as the butterfly ballot and two-page ballot listings of candidates for the same office.

b. A standard ballot form should be designed by social scientists and thoroughly tested for ease of use, machine readability, and accuracy in hand tabulators' discernment of voter intent.

c. Machinery used to tabulate votes should meet standards for accuracy established by a national public scientific body recognized for establishing quality standards.

d. States should be encouraged to adopt universal, easy to interpret standards governing when a machine recount will be held, when a manual recount will be held, how these recounts will be performed, who will perform them, the standards to be used to perform them, and when they should be completed. Universal, easy to interpret standards should also govern contests, certifications and protests.

5. Equality under the law: eliminating all vestiges of disenfranchisement based on race, language, social class or perceived political affiliation

   a. Polling places, voting machines and staff should be proportionately distributed, so that no groups of voters will have to wait relatively longer in line.

   b. Translators should be available, in person or electronically, at each polling place.

   c. No voter should be asked for more (or more detailed, *e.g.*, photo) items of identification than any other voter.

   d. Police departments should be discouraged from taking steps (intentionally or otherwise) that could create the appearance of efforts to disenfranchise voters, *e.g.*, checkpoints, sobriety roadblocks, or other enhanced efforts to stop motorists in the vicinity of polling places.

e. Legislatures might consider adopting procedures for expedited review of allegations of voting irregularities.

CONCLUSION

This Court should hold proponents of not tallying and recording legally cast votes to the exacting burden of persuasion justified by our electoral history.

Our system has stumbled when an election case arrives in any court. Consequently, this Court would perform a valuable public service by drawing attention to the many noncontroversial, nonpartisan, race-neutral standards and procedures available to a nation seeking to heal itself and make more perfect its union.

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No. 00-949 (19)

IN THE
Supreme Court of the United States

RECEIVED
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SUPREME COURT, U.S.

GEORGE W. BUSH, et al.
Petitioner,

v.

ALBERT GORE, JR., et al.
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

MOTION FOR DIVIDED ARGUMENT

Pursuant to Rules 21 and 28.4 of the Rules of this Court, Respondents, Katherine Harris, Florida Secretary of State, and Katherine Harris, Laurence C. Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission, (the "Canvassing Commission Respondents"), respectfully request that the oral argument time for petitioner be divided as follows: thirty-five (35) minutes for Petitioner, George W. Bush, to be followed by ten minutes for the Canvassing Commission Respondents. Petitioner has agreed to cede ten minutes of his time to the Canvassing Commission Respondents.

This case arises out of the November 7, 2000 election for President of the United States conducted in the state of Florida. Among other issues, this case presents the questions of whether the Supreme Court of Florida established new standards for resolving presidential election contests that conflict with legislative enactments and whether selective manual recounts with procedures that vary across counties is constitutionally infirm. The Secretary of State

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("Secretary") is charged under Florida law with, among other duties, the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws," Fla. Stat. § 97.012(1), and the Director of the Division of Elections ("Director") is required to "provide advisory opinions when requested by any supervisor of elections... relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor... has taken or proposes to take." Fla. Stat. § 106.23(2). The Secretary and the Director are two of the three members of the Elections Canvassing Commission. Thus, the Secretary, the Director, and the Elections Canvassing Commission have a strong interest in ensuring that Florida election law is properly and uniformly applied.

In addition, the Canvassing Commission Respondents litigated the merits of this case in the Circuit Court for Leon County and argued before the Supreme Court of Florida. Coupled with the Canvassing Commission Respondents' expertise in Florida election law, they are likely to be in the best position to address any questions the Court may have regarding the state court litigation or Florida election law prior to November 7, 2000. Thus, we believe that an oral presentation by the Canvassing Commission Respondents would be of further assistance to the Court. Accordingly, we respectfully request that the Canvassing Commission Respondents be accorded ten minutes of the total argument time allotted to Petitioner.

Dated this 9th day of December, 2000.

Respectfully submitted,

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Motion for divided argument.wpd